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No. 10-1271

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BILLIE WAYNE COBLE,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court held that the Constitution did not require the categorical exclusion of all expert testimony regarding future dangerousness in a capital case. In *Jurek v. Texas*, 428 U.S. 262 (1976), this Court considered the constitutionality of Texas's unique capital-sentencing statute, which requires juries to decide "whether the defendant would commit continuing acts of violence that would constitute a threat to society" if not sentenced to death. *Id.* at 272. The Court found this statute did not run afoul of the Eighth Amendment, based in part on the State's representation that in considering this special issue the jury was to make a literal assessment of whether the defendant would be dangerous in the future, given his likely circumstances.

The questions presented are:

1. Did the Texas Court of Criminal Appeals improperly extend *Barefoot v. Estelle* by reading that case as categorically foreclosing any claim that the admission of unreliable expert testimony in a particular case violates the federal constitution?

2. Did the Texas Court of Criminal Appeals undercut *Jurek v. Texas* by abandoning the objective, predictive consideration of future dangerousness which Texas represented to this Court in that case was required under state law and retroactively replacing it with

an amorphous and conjectural dangerous-character test?

Petitioner Billie Wayne Coble respectfully petitions this Court to review the judgment of the Texas Court of Criminal Appeals.

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OPINIONS BELOW

The decision of the CCA, *Coble v. Texas*, 330 S.W.3d 253 (Tex. Crim. App. 2010), affirming Coble's death sentence, is reprinted in the Appendix at 1a-87a. Its order denying rehearing is unreported, and is reprinted in the Appendix at 88a.

JURISDICTION

The CCA issued its opinion in this case on October 13, 2010. On January 12, 2011, it denied Coble's timely petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Texas Code of Criminal Procedure Article 37.0711, Section 3(b), which states in relevant part that "the court shall submit the following [] issue[] to the jury... (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society".

2. This case involves the Eighth Amendment to the United States Constitution, which provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. This case involves the Fourteenth Amendment to the United States Constitution, which provides, in relevant part, that "No State shall . . .

deprive any person of life [or] liberty . . . without due process of law."

INTRODUCTION

Billie Wayne Coble was first convicted and sentenced to death by a Texas jury in 1990. The United States Court of Appeals for the Fifth Circuit awarded habeas relief, and a new capital sentencing hearing was held in 2008. In the eighteen years between his first and second sentencing hearings, Coble had a spotless prison disciplinary record. He was never once issued a violation notice. He proved to be a model inmate and positive contributor to prison society.

Under Texas law, before a jury may sentence a defendant to death, the State must prove that there is a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[1] Coble's prison record was perfect. There was no evidence he would ever be released if spared execution. The State nevertheless made its case for death at the retrial by arguing that he was a future danger so long as the jury could imagine factual circumstances in which he might be dangerous – such as release from prison – regardless of how unlikely they were to occur.

The State sought to bolster this theory with the "expert" testimony of a psychiatrist, Dr. Richard Coons. As the Texas Court of Criminal Appeals ("CCA") found, Dr. Coons's testimony that Coble was likely to commit criminal acts in the future was

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[1] *See* TEX. CODE CRIM. PROC. art 37.0711, § 3 (b)(2).

based on his own, idiosyncratic, subjective methodology and was thoroughly unreliable. Dr. Coons was unable to cite a single book, treatise, or article discussing any of the factors he identified as important in his methodology. He was unaware of the literature describing violence predictions and he had never attempted to check his own accuracy rate in predicting future dangerousness.

The CCA held that Dr. Coons's testimony had been improperly admitted under the Texas Rules of Evidence because it was too unreliable for consideration by the jury. But the court dismissed this error as harmless after finding that it did not affect Coble's substantial rights to a fair sentencing trial - the standard which Texas applies to non-constitutional error.[2]

In a single sentence, the court rejected Coble's contention that the admission of this unreliable testimony also violated his federal constitutional rights. It held that this Court's decision in *Barefoot v. Estelle* precluded any constitutional challenge to the admission of expert testimony regarding future dangerousness, however unreliable and scientifically baseless that testimony is. Accordingly, the court did not consider whether the state could prove admission of the testimony harmless under the standard announced in *Chapman v. California*, 386 U.S. 18 (1967).[3]

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[2] *See* TEX. R. APP. P. 44.2(b).

[3] *See also* TEX. R. APP. P. 44.2(a).

The court went on to hold that when applying Texas's future-dangerousness provision in capital sentencing, the issue is not whether the defendant is actually likely to be dangerous in the future if spared execution. The issue, instead, is whether he has a kind of innately violent character which might be threatening under any circumstances, no matter how speculative or unlikely to occur those circumstances may be. The court relied on *Jurek* to reject Coble's Eighth Amendment objection to this post-*Jurek* transmogrification of "future dangerousness."

The CCA's holdings on these constitutional questions inappropriately distorted and expanded this Court's original decisions in *Jurek* and *Barefoot*. These holdings cannot be squared with this Court's precedents and require intervention by this Court.

STATEMENT OF THE CASE

A. THE EXPERT TESTIMONY OF PSYCHIATRIST DR. RICHARD COONS

1. Trial proceedings

In September 2008, after the Fifth Circuit vacated Coble's death sentence, the trial court held a capital resentencing hearing to determine the penalty for his murder of his ex-wife's mother, father and brother. At the hearing, the defense put on uncontroverted evidence that Coble, a former Marine who had served honorably in the Vietnam War, had not received a single disciplinary notice in eighteen

years on Texas's death row.[4] For the first approximately nine years after his death sentence, Coble was housed in Texas's former death row at the Ellis Unit, where he had group recreation and participated in work programs. During this period, he organized sports tournaments for the inmates in order to boost morale and to help keep them out of trouble. 25 RR 65, 95-96.[5] He always tried to help the younger inmates by mentoring them. 25 RR 70, 86 87. He assisted illiterate and mentally retarded inmates by helping them read and write letters to their friends and family members. 25 RR 71, 150-53. He helped one death row inmate learn English. 25 RR 150.

Coble got along well with the guards, including women guards. 25 RR 89-90. His peaceful behavior, good spirits and helpful nature continued even after he and all other death row inmates were

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[4] The defense also introduced evidence of Coble's difficult childhood and young adult years. His father died before Coble was born and his mother suffered incapacitating mental illness, for which she was hospitalized and received shock therapy. 26 RR 22-29. (RR refers to the reporter's trial record from the 2008 trial.) Coble's mother was unable at times to recognize her children, *id.*, who were placed in a State home. 26 RR 28-29. At age 17, Coble enlisted in the Marines, and was deployed to Vietnam. 26 RR 35, 36-37. He was in active duty there as a machine-gunner, and was injured while in the line of duty. 26 RR 39. After his honorable discharge, he returned home and changed from a man who always laughed and smiled to a distant shell of his former shelf. 25 RR 25, 26 RR 37-38.

[5] According to other death row inmates, Coble was "well liked by everyone," always "even keeled," and had a good and "peaceful" reputation. 25 RR 60-61, 86-87.

transferred to the Polunsky Unit, the more restrictive current death row. 25 RR 102. As the CCA observed in reviewing this evidence, "[t]here is no denying [Coble's] impressive history of nonviolence in prison." Pet. App. at 20a. A medical doctor also testified that Coble, who was 59 at trial, suffers from serious health problems, including heart disease and high blood pressure. 25 RR 49.

In addition, the defense called a forensic psychologist, Dr. Mark Cunningham, who testified that Coble had a low probability of committing a future act of serious violence. 27 RR 95-123, 204-205. Dr. Cunningham's methodology relies on a statistical risk assessment approach, based on actuarial data about violence in prison. 27 RR 125-130. Dr. Cunningham, who has studied and published extensively in the field of violence risk assessment, testified that his methodology is documented in a number of published, peer-reviewed periodicals. 27 RR 122. He explained that he has been able to calculate the error rate for all cases in which he has testified and it was less than two percent. 27 RR 189.

The State's case in chief consisted primarily of a host of lay witnesses, a psychiatrist who had evaluated Coble in 1964 when he was 15 years old, 24 RR 9, 11,[6] and a psychiatrist who testified about future dangerousness, Dr. Richard Coons. The lay

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[6] Dr. Ralph Hodges testified about Coble's difficult childhood and that, at age 15, Coble "seemed extremely hostile to women, made deprecating remarks about them, and in general, seemed to have a very low opinion of women." 24 RR 13.

witnesses testified about the details of the crime, Coble's history of domestic violence with his ex-wives, and multiple allegations of molestation, inappropriate touching, and groping of teenage girls. *See, e.g.*, 20 RR 40-49, 107-110, 112-23, 192-96; 21 RR 14, 118-26; 22 RR 82-99, 105-117, 146-57; 23 RR 33-50. This conduct all occurred between the years of 1970 and 1989. *Id.*

To conclude its case in chief, the State called Dr. Richard Coons. 24 RR 202. Before his testimony was presented to the jury, the defense objected to it under Texas Rule of Evidence 702 and the Eighth Amendment. 24 RR 200. The trial judge overruled the objection. 24 RR 201.

Dr. Coons informed the jury of his qualifications, including his extensive prior forensic and clinical experience (treating "several thousand private patients"), his evaluation of future dangerousness in 150 capital cases, and his testimony in 50 of those cases. 24 RR 204, 206.[7] He told the jury about how he developed his methodology generally, and the factors he considered. 24 RR 208-09.

Dr. Coons explained that he had interviewed Coble before testifying in his 1990 trial, but that he had since lost his interview notes. 24 RR 210-11. The prosecution then asked Dr. Coons a long, hypothetical question, spanning nine pages of the

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[7] One of the many capital cases in which Dr. Coons testified was Thomas Barefoot's. Dr. Coons testified at the habeas hearing for the State that Barefoot would likely commit future acts of violence. *See* 463 U.S. at 899 n.7.

transcript, and based on 57 assumptions. 24 RR 211-19. At the end, the prosecutor asked whether Dr. Coons could "make a determination as to whether ... there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society?" 24 RR 218. Dr. Coons responded, "[t]here is a probability he would do that." 24 RR 291. He then explained that his opinion was based on the facts of the crime, Coble's "attitude about violence," and his "weak" and "defective" conscience. 24 RR 219-223. Dr. Coons also repeatedly testified about his personal belief that all death row inmates "mind their behavior" because they have pending appeals and have an incentive to avoid developing a bad record in the event of a retrial. 24 RR 209-10, 223-24. This belief was not founded in any research or studies. *Id.*

In summation, the prosecution used Dr. Coons's testimony to press its case for death. It argued in both its first and final arguments that the jury should credit Dr. Coons's opinions – that Coble has no conscience and no regard for human beings and thus is likely to commit future criminal acts of violence – because "it's just common sense." 29 RR 124; *see also*, 29 RR 170 (describing Dr. Coons's approach as "remarkably commonsensical"). The State argued that Coble is a "dangerous person," and that "if he is the same person today, as the evidence shows he is, then he is absolutely dangerous." 29 RR 122.

2. The Opinion of the CCA

The CCA engaged in a careful analysis of whether Dr. Coons's testimony satisfied the reliability requirements imposed by Texas Rule of Evidence 702.[8] Pet. App. at 22a-27a, 38a- 44a. The court concluded that the testimony was insufficiently reliable and should not have been admitted, explaining:

> From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area. There is no objective source material in this record to substantiate Dr. Coons's methodology as one that is appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the principles involved in the field of psychiatry, but this is simply the *ipse dixit* of the witness. Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions, Dr.

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[8] Texas Rule of Evidence 702, like Federal Rule of Evidence 702, states "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.

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Dr. Coons stated that he relies upon a specific set of factors: history of violence, attitude toward violence, the crime itself, personality and general behavior, conscience, and where the person will be (i.e., the free community, prison, or death row). These factors sound like common-sense ones that the jury would consider on its own, but are they ones that the forensic psychiatric community accepts as valid? Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time? Some of Dr. Coons's factors have great intuitive appeal to jurors and judges, but are they actually accurate predictors of future behavior? Dr. Coons forthrightly stated that "he does it his way" with his own methodology and has never gone back to see whether his prior predictions of future dangerousness have, in fact, been accurate. Although he had interviewed appellant before the first trial in 1990, Dr. Coons had lost his notes of that interview in a flood and apparently had no independent memory of that interview. He relied entirely upon the documentary materials given to him by the prosecution, including his 1989 report. Dr. Coons, therefore, did not perform any psychiatric

> assessment of appellant after his eighteen years of nonviolent behavior on death row, nor did he refer to any psychological testing that might have occurred in that time frame.
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> ***
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> Based upon the specific problems and omissions cited above, we conclude that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly* gatekeeping hearing in this particular case. We conclude that the trial judge therefore abused his discretion in admitting Dr. Coons's testimony before the jury.

Id. at 38a-44a (footnotes and citations omitted).

In contrast to its thoughtful and extensive analysis under the Rules of Evidence, the CCA dismissed in a single sentence Coble's argument that admission of Dr. Coons's unreliable testimony violated his constitutional rights: ". . . [A]ppellant asserts that this type of evidence fails to meet the heightened reliability requirement of the Eighth Amendment, but the United States Supreme Court, in *Barefoot v. Estelle*, rejected this argument, and we are required to follow binding precedent from that court on federal constitutional issues." Pet. App. at 22a. Because the admission of Dr. Coons's testimony violated only a rule of evidence, in its view, the CCA concluded that the harmless error standard for non-constitutional error applied. *Id.* at 45a n. 71. Under

this more lenient standard, the CCA held the admission of the testimony did not have a substantial and injurious effect on the jury's deliberations, and affirmed Coble's death sentence. *Id.* at 59a-61a. Had the CCA held that Coble's constitutional rights were violated, it would have instead asked whether the State had proved that admission of Dr. Coons's testimony was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 22-24; TEX. R. APP. P. 44.2(a).

B. THE TEST FOR FUTURE DANGEROUSNESS

1. The Test as Articulated in the Trial Proceedings.

No evidence was introduced at trial that Coble would be released, or could be released, from prison. In fact, Texas law prohibited Coble from presenting expert testimony that he would never be released from prison. *Jones v. State*, 843 S.W.2d 487, 495 (Tex.Crim.App.1992). *See also Smith v. State*, 898 S.W.2d 838, 846 (Tex.Crim.App.1995) (holding inadmissible testimony concerning how long a life-sentenced capital defendant would spend in prison). Nevertheless, throughout the sentencing trial, the State framed its future dangerousness case against Coble, then nearing 60 years of age, by invoking the *hypothetical* threat of violence he could pose if not in prison. For example, when cross-examining the defense's expert, Dr. Mark Cunningham, the State asked a hypothetical question that *assumed* that Coble would be released from prison and have access to his ex-wife, whose family he had killed:

> Now, if – *if* Billie Wayne Coble still hates [his ex-wife] and her family and if he has a desire to do them in or do them harm and *if* he had the opportunity to do so, *if he had the opportunity if he was in a position where he could harm them*, there is certainly a reasonable probability that he would commit criminal acts of violence that could constitute a continuing threat to society, isn't there?

27 RR 278 (emphasis added). Dr. Cunningham answered, "*If* all of those things were present in that extreme way, yes, sir, there would be significant risk." 27 RR 279 (emphasis added).

With similar emphasis on the possibility that Coble would be dangerous outside of prison, the State argued to the jury:

> He has no conscience. And if you have no conscience and you prove that you're capable of committing acts of violence, there is that probability. Folks, he hasn't changed. *He's just been restrained.* If you don't [agree], ask yourself this question, do you think he's dangerous, *would you put him out in the street this minute and let him walk out of this courthouse, would anybody vote that way? And if you wouldn't, he's dangerous.* And if he is dangerous, there is the probability – he hasn't done it yet. We don't say it's a certainty. Remember, the law says that you look

> at society. *You don't – you're not limited in your view of tunnel vision just to prison.* You consider the whole thing, free world and prison. Is he dangerous? Yes. No question.

29 RR 126 (emphasis added).[9]

Rather than clarifying in what circumstances, if any, the jury could consider Coble's possible dangerousness outside of prison, the trial court charged the jury that "you are not to consider or discuss the possibility of pardon or parole, or concern yourself with how long Billie Wayne Coble would be required to serve if sentenced to life imprisonment. Such matters are not a matter of concern for the jury." 29 RR 114-15.[10] This charge left open the possibility that Coble would be released on parole, gaining a theoretical opportunity to harm his ex

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[9] Defense counsel argued that the State's use of the future-dangerousness special issue in this manner violated the Eighth Amendment as applied to Petitioner because the State had "introduce[ed] the specter of [his] getting out . . . when that is not a viable option for the jurors to consider, [which] renders a decision arbitrary because they are making a decision as to future dangerousness based upon a situation which they are not even supposed to contemplate him ever – ever obtaining being out in the free world." 29 RR 103-04. The State responded by relying on the Texas law set forth *supra*. 29 RR 104, 126. The trial court overruled this objection. 29 RR 104.

[10] The trial court also instructed the jury to answer the special issue as set forth in the Texas capital statute: "Do you find from the evidence beyond a reasonable doubt that there is a probability that Billie Wayne Coble would commit criminal acts of violence that would constitute a continuing threat to society?" 29 RR 113.

wife's family. The State exploited this possibility to win a death sentence. 29 RR 126.

The jury undoubtedly was thoroughly confused by the combination of the State's arguments and the court's charge (both apparently permitted under Texas case law). After a few short hours of deliberation, the jury sentenced Coble to death.

2. The Test for Future Dangerousness Approved by the Texas CCA.

On direct appeal, Coble argued that he "was almost 60 years of age at the time of trial, and in poor health. Given his age, if he didn't die in prison he was going to spend most of his remaining life there. . . . [His] disciplinary record was spotless – no small feat for someone who had spent 18 years on death row. [Thus, t]he state failed to produce any evidence – much less evidence beyond a reasonable doubt – that he would constitute a danger within the confines of the Texas Department of Criminal Justice." Pet. Br. at 26-28. The CCA, however, rejected Coble's claim that the State's evidence of future dangerousness was legally insufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979). Pet. App. at 10a-21a. The court did not assess what danger he could possibly pose given his age, poor health, clean prison record, and the likelihood he would die in prison if not executed.[11] The court stated that the test was not whether Coble would likely pose a

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[11] Nor did the court factually dispute Petitioner's old age, health problems, pristine prison record, or the likelihood that he would die in prison.

threat of future danger if spared execution – or whether he would be dangerous given how long he would spend in prison if sentenced to life. Rather, the test was whether Coble, in the abstract, has a "character for violence." *Id.* at 17a. The CCA explained:

> The special issue focuses upon the *character for violence of the particular individual*, not merely the quantity or quality of the institutional restraints put on that person.[12] As we recently stated in *Estrada v. State*, [313 S.W.3d 274, 281 (Tex.Crim. App. 2010)], "This Court's case law has construed the future dangerousness special issue to ask whether a defendant would constitute a continuing threat 'whether in or out of prison' *without regard to how long the defendant would actually spend in prison if sentenced to life.*" That is, this special issue focuses upon the internal restraints of the individual, not merely the external restraints of incarceration. It is theoretically possible to devise a prison environment so confining, isolated, and highly structured that virtually no one could have the opportunity to commit an act of violence, but incapacitation is not the

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[12] As discussed *infra*, in support of this particular assertion, the court cited *Jurek v. Texas*, 428 U.S. 262 (1976). *See* Pet. App. at 17a-18a n.19.

> sole focus of the Legislature or of our death penalty precedents.

Id. at 17a-19a (notes omitted) (emphasis added).

The CCA found there was "no denying [Coble's] impressive history of nonviolence in prison." *Id.* at 20a. Yet it found he remained a future danger because he maintained the same violent "character" he had always had, regardless of whether he could act on this "character" if not executed. *Id.* at 21a. The court stated that the issue

> is whether he is the same person-with the *same character* for sudden explosive violence-that he was when he was diagnosed at age 15 as having a "sociopathic personality disturbance of the dissocial type." Has *his character* changed since he was again diagnosed as having a lifelong history of maladjustment, belligerence and violence, when he was hospitalized at the age of 19 after fighting with his fiancée and stabbing himself in the thigh as a Marine?

Id. at 20a (emphasis added). Finding that the evidentiary answers to these questions supported the jury's affirmative finding of future dangerousness, the court denied this legal-insufficiency claim.

REASONS FOR GRANTING THE PETITION

I. THE CCA MISINTERPRETED THIS COURT'S RULING IN *BAREFOOT V. ESTELLE* AND THEREFORE FAILED TO APPLY THE APPROPRIATE EIGHTH AMENDMENT STANDARD TO COBLE'S CLAIM THAT THE ADMISSION OF UNRELIABLE TESTIMONY VIOLATED HIS CONSTITUTIONAL RIGHTS.

A. The CCA's Holding that the Eighth Amendment Does Not Afford Protection Against the Admission of Unreliable Expert Testimony is an Unprecedented and Unwarranted Expansion of this Court's Holding in *Barefoot v. Estelle.*

The CCA held that the State failed to show what general principles of forensic psychiatry Dr. Coons "might have relied upon because he cited no books, articles, journals or even other forensic psychiatrists who practice in this area." Pet. App. at 38a. The court ruled that Dr. Coons was utterly uninformed, indeed entirely unaware, of the substantial body of literature about risk assessment predictions. *Id.* at 38a-40a. The court stated that he was unable to point to any source of evidence showing that his "common sense" approach had ever been empirically validated or verified for accuracy, or that there was any reason to believe it was in fact an accurate prediction of future behavior. *Id.* at 38a-43a. Nevertheless, the court refused to consider Coble's constitutional challenge to the admission of

Dr. Coons's testimony, ruling that the claim was foreclosed by *Barefoot*. *Id.* at 22a.

In so ruling, the CCA applied an overly broad reading of *Barefoot* that forecloses consideration of any constitutional challenge to the admission of expert testimony on future dangerousness in a capital sentencing hearing, regardless of how unreliable, speculative and idiosyncratic that testimony was. Two other federal cases have made this same error. *See United States v. Fields*, 483 F.3d 313, 345 (5th Cir. 2007) ("Fields also claims that the admission of Dr. Coons's testimony regarding future dangerousness during the punishment phase violated his rights under the Eighth and Fifth Amendments. *Barefoot* forecloses this claim."); *Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002) ("Johnson's argument about the inadmissibility of Grigson's testimony is foreclosed by *Barefoot v. Estelle*, where the Supreme Court rejected the view that this type of evidence is inadmissable.").

Under these decisions, admission of expert testimony about future dangerousness will *never* violate the Eighth Amendment. In a concurring opinion in *General Elec. Co. v. Joiner*, 522 U.S. 136, 154 n.6 (1997), Justice Stevens cited to a hypothetical "phrenologist who would purport to prove a defendant's future dangerousness based on the contours of the defendant's skull" as the kind of "junk science" that must be excluded under this Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Yet, under the CCA's interpretation of *Barefoot*,

admission of the phrenologist's testimony regarding the contours of a defendant's skull – like the admission of Dr. Coons's unreliable testimony - would not pose an Eighth Amendment problem. *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (*Daubert* requires the trial court to assure itself that the experience-based expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.") (cited in *Coble*, *supra*, at 27a).

By failing to consider as part of its constitutional analysis any of the factors demonstrating the unreliability of Dr. Coons's testimony, the CCA implicitly announced that those factors are irrelevant under the Eighth Amendment. The court's overly broad reading of *Barefoot*, like those of the Fifth Circuit, cannot be squared with this Court's Eighth Amendment jurisprudence or with *Barefoot* itself.

Below, the CCA misconstrued *Barefoot* to announce a categorical rule that no future dangerousness testimony, regardless of the particular circumstances of the case, could be so unreliable as to require relief under the Constitution. It is true that this Court in *Barefoot* rejected the petitioner's categorical claim that every admission of expert testimony about future dangerousness violates the Eighth Amendment. 463 U.S. at 896, 900 (rejecting the argument that the entire "category of testimony should be excised entirely from all trials" because of the variability in the reliability of

different psychiatrists' testimony).[13] However, the Court also considered and rejected the argument that "*in the particular circumstances of this case*, the testimony of the psychiatrists was so unreliable that the sentence should be set aside." *Id.* at 896 (emphasis added).

The standard for whether the admission of unreliable expert testimony in a particular case violates the Constitution is found in this Court's Eighth Amendment jurisprudence. The Court has long recognized that the Eighth Amendment

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[13] *Barefoot*'s reliance on now out-of-date evidentiary principles has led numerous commentators to conclude that the decision is inconsistent with the approach today to admission of expert scientific evidence. *See e.g.*, Erica Beecher-Monas & Edgar Garcia-Ril, *The Law and the Brain: Judging Scientific Evidence of Intent*, 1 J. APP. PRAC. & PROCESS 243, 274 (1999) ("The point is not that *Daubert* overrules *Barefoot*. It does not. Rather, the point is that the conceptual underpinnings of *Daubert* are anathema to the result in *Barefoot*."); David L. Faigman, *The Evidentiary Status or Social Science Under Daubert: Is It "Scientific," "Technical, or "Other" Knowledge?*, 1 PSYCHOL. PUB. POL'Y & L. 960, 967 n.32 (1995) ("*Barefoot* is inconsistent with *Daubert*."); Paul C. Giannelli, *Daubert: Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999, 2021 (1994) ("*Barefoot* is inconsistent with *Daubert* . . . *Daubert* required a higher standard of admissibility for money damages than *Barefoot* required for the death penalty."); John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY'S L.J. 1, 37 (1996) ("If *Barefoot* does not necessarily conflict with *Daubert*, it certainly is in tension with it."); Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 338 (1999) ("Notwithstanding the fact that *Barefoot* and *Daubert* can stand together as a matter of law, it may be fair to say that they cannot co-exist as a matter of common sense.")

demands heightened reliability and accuracy in capital trials. *See e.g.*, *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) ("The Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'") (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1976)); *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case.") (citation and internal quotation marks omitted); *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (stating that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die").

Thus, in *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985), the Court relied upon the Eighth Amendment's demand for heightened reliability to invalidate the defendant's death sentence because the prosecutor's argument misled the jury regarding their responsibility for the death sentence. *Id.* at 329 ("Accordingly, many of the limits that this Court has placed on the imposition of capital punishment [under the Eighth Amendment] are rooted in a concern that the sentencing process should facilitate the responsible and *reliable* exercise of sentencing discretion.") (emphasis added). Similarly, in *Johnson*, the Court found an Eighth Amendment violation when the defendant's death sentence was based in part on a reversed conviction, and the jury

was permitted to make its determination from "materially inaccurate" evidence. *Johnson*, 486 U.S. at 584-86.[14]

Barefoot carved no exception to these settled principles. The CCA, therefore, erred by failing to consider whether, in light of the undisputed facts showing Dr. Coons's testimony was unreliable and inaccurate, its admission violated the Eighth Amendment. *See, e.g., Redmen v. State*, 828 P.2d 395, 400 (Nev. 1992) (holding that the admission of psychiatric expert testimony was constitutional error because it was "highly unreliable").

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[14] The Court has also identified similar reliability concerns rooted in the Due Process Clause. In *Payne v. Tennessee*, 501 U.S. 808 (1991), it recognized that the Due Process Clause serves as protection against the admission of unduly prejudicial victim impact evidence. *See id.* at 825 (" In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."). Due process was the foundation for the rule in *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994), that a capital defendant is entitled to introduce evidence regarding parole ineligibility when the State has raised future dangerousness to avoid misleading the jury, and the rule in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), that a capital defendant must be afforded the opportunity to deny or explain information used against him in capital sentencing hearings.

B. Admission of Dr. Coons's Testimony Violated the Eighth Amendment Under this Court's Settled Jurisprudence.

Had the CCA considered Coble's constitutional claim, it would have concluded that the admission of Dr. Coons's testimony violated his Eighth Amendment rights. The CCA found significant evidentiary deficiencies with Dr. Coons's testimony and his idiosyncratic, subjective methodology.[15] Specifically, it found Dr. Coons did not rely upon any clear principle of forensic psychiatry or any published literature in the field. Pet. App. at 38a-40a. The court summarized his subjective methodology by quoting Dr. Coons's acknowledgement that "he does it his way." *Id.* at 43a. The CCA further found that there was no evidence to conclude that "his way" was accurate or reliable. *Id.* at 38a-42a.

Absent any assurance of reliability, Dr.Coons's testimony may have been as accurate as soothsayers or the phrenologists who purport to make predictions

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[15] The CCA evaluated whether Dr. Coons's testimony "properly relie[d] upon and/or utilizes the principles involved in the field." Pet. App. at 31a (*citing Nenno v. State*, 970 S.W.2d 549, 561 (Tex.Crim.App. 1998) (the lead Texas case setting forth the admissibility standard of "soft" science testimony). The CCA was also guided by the familiar principles from *Daubert* that scientific evidence should be analyzed for: "(1) fallibility; (2) peer review and publication; (3) the existence of methodological standards, including error rate; and (4) general acceptance within the relevant scientific field." *Id.* at 28a.

based on skull size. *Cf., Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000) (J. Garza, concurring) (finding that similar expert future dangerousness testimony fails the *Daubert* standards, "defies scientific rigor and cannot be described as expert testimony"). The jury, however, was ill-equipped to recognize the limitations in his testimony, precisely because it was presented to them as the testimony of a qualified expert. *Id.* at 465-66 ("As some courts have indicated, the problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact."); *United States v. Sampson*, 335 F. Supp. 2d 166, 220 (D. Mass. 2004) ("Jurors, however, may give great deference to the testimony of a psychiatrist as a supposed expert for purposes of determining future dangerousness.").

Here, there were particular risks that Coble's jury would have been unable to disregard the kind of unreliable expert testimony about future dangerousness offered by Dr. Coons. *See* Erica Beecher-Monas, *The Epistemology of Prediction*, 60 WASH. & LEE L. REV. 353 (2003); Erica Beecher-Monas, *Heuristics, Biases, and the Importance of Gatekeeping*, 2003 MICH. ST. L. REV 987, 1003, 1018-19 (2003); Daniel A. Krassu & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL'Y & L. 267, 300 (2001).

First, juries are more likely to credit unreliable "clinician" experts, such as Dr. Coons, than more reliable actuarial experts, even when the shortcomings of the clinician's approach are exposed through cross-examination. Beecher-Monas, 60 WASH. & LEE L. REV. at 386-87;[16] Krauss & Sales, 7 PSYCH. PUB. POL'Y & L. at 300-302. Second, juries are more likely to embrace expert testimony that confirms their opinions of the crime. *See* Beecher-Monas, 2003 MICH. ST. L. REV at 1018-19 (describing the risk with future dangerousness experts that "jurors may be overconfident in their decision of guilt and subsequently overvalue the expert prediction that confirms their decision, giving disproportionate weight to any information that confirms their initial decision of guilt"). Thus, it is no answer that Dr. Coons's unreliable testimony was subjected to cross-examination. *See also, United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (acknowledging the risk that juries may give polygraph experts excessive weight).

The sentencing evidence presented at Coble's penalty trial from Dr. Coons was no more reliable than the misleading arguments struck in *Caldwell* or the inaccurate evidence criticized in *Johnson*. As the CCA found, Dr. Coons's testimony was neither reliable nor accurate. It was based on a subjective, unsubstantiated methodology that had no scientific foundation. The admission of his testimony thus allowed the jury to make its life or death determination based on unreliable, inaccurate

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[16] This may be due to juror's trust and familiarity with medical diagnoses. *Id.* at 387.

information in violation of Coble's Eighth Amendment rights. *Caldwell*, 472 U.S. at 341 (holding that where the State's impermissible argument may have had an affect on the jury's verdict, the case "does not meet the standard of reliability that the Eighth Amendment requires"); *Johnson*, 486 U.S. at 578 (reversing based on the use of illegitimate evidence in the sentencing hearing because of the possibility that this evidence was decisive in the "choice between a life sentence and death sentence") (*quoting Gardner*, 430 U.S. at 359).

C. Coble's Case Presents an Ideal Vehicle For This Court to Address These Important Questions and Ensure Future Compliance with the Requirements of the Constitution.

Coble's case is an excellent vehicle to consider the contours of the Eighth Amendment's protection against unreliable expert testimony because of the substantial factual findings by the CCA regarding Dr. Coons's testimony, and its utter lack of reliability. Expert evidence of future dangerousness is standard in Texas capital cases and this error is likely to arise time and again without intervention by this court. *See e.g., Flores*, 210 F.3d at 456 (Garza, J. concurring) (describing and criticizing the common practice in Texas of calling "experts" to testify regarding future dangerousness based on debunked or unsupported methods). The CCA's decision in *Coble* is at least the third decision to rest on an erroneously extension *of Barefoot*. *Fields*, 483 F.3d at 345; *Johnson*, 306 F.3d at 255. Intervention by this Court is required to ensure that Coble and

other future capital defendants receive the protection afforded by the Eighth Amendment.

II. TEXAS HAS REPLACED THE LITERAL AND PREDICTIVE TEST OF FUTURE DANGEROUSNESS IT ASSURED THE COURT IN *JUREK V. TEXAS* IT WOULD USE WITH A VAGUE, AMORPHOUS, AND CONJECTURAL "CHARACTER FOR VIOLENCE" TEST. THE WRIT SHOULD BE GRANTED TO ALLOW CONSTITUTIONAL REVIEW OF THIS NEW STANDARD.

A. The Standard the State Court Applied Fails to Comply with the Assurances Texas Made to this Court when it Decided *Jurek v. Texas*.

In *Jurek v. Texas*, a plurality of this Court rejected Jurek's argument that the future-dangerousness special issue was "so vague as to be meaningless." 428 U.S. 262, 274 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). A jury's task in predicting a defendant's future dangerousness, the Court found, was the same task inherent in decisions regularly made in our criminal justice system, including decisions concerning bail, parole, and sentencing. *Id.* at 275. Each requires a literal assessment whether a person will be dangerous in the future, given his likely circumstances. For example, a trial judge assessing whether bail is appropriate would certainly consider where the defendant would reside during the pendency of the trial. In subsequent cases citing *Jurek*, the Court

has expressed the same understanding of the future-dangerousness test as a contextual one – would the defendant be a future danger in the circumstances that would apply if he were not executed?[17]

The Court's assumption in *Jurek* that Texas evaluated future dangerousness in a manner consistent with this understanding was prompted by the Texas Attorney General. Texas's brief stated that the Legislature had designed the future-dangerousness special issue to assess, on an individual basis, "the likelihood of future criminality and the need to incapacitate for the protection of society." Brief of Respondent at 31, *Jurek v. Texas*, 428 U.S. 262 (1976) (No. 75-5394) (hereinafter "*Jurek* Resp't Br."). In fact, while the brief stated that the scheme's other special issues met other penological goals,[18] it repeatedly linked the future-

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[17] *See Barefoot*, 463 U.S. at 897-898 ("Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made."); *Skipper v. South Carolina*, 476 U.S 1, 5 (1986) (citing *Jurek* for the prospect that the "Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing"); *Simmons*, 512 U.S. at 162 ("This Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.").

[18] "[T]he Texas legislature has purposely limited the availability of the death penalty to categories of murder wherein the deterrent effect can be reasonably thought to be maximized and

dangerousness special issue to incapacitation and incapacitation alone. *Id.* at 5, 26, 29, 30, 31.[19] The Attorney General's singular focus on incapacitation was significant: incapacitation by execution is necessary only where "there is a probability," TEX. CODE CRIM. PROC. art. 37.0711 § 3 (b)(2), that a defendant would otherwise continue to pose a threat of danger. Incapacitation addresses danger in reality, not in the abstract.

The future-dangerousness inquiry Texas described (and this Court approved) in *Jurek*, however, bears little resemblance to the test the CCA employed to affirm Coble's death sentence. The CCA's recently announced test requires the jury to "assess [a person's] present *character* for future dangerousness" in the abstract, Pet. App. at 21a (emphasis added),[20] rather than the "need to

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wherein there is a significant need for retribution." *Jurek* Resp't Brief at 25. The brief further explained that two special issues then part of Texas's capital statute – a special issue asking if the murder was deliberate and another asking if the killing was in response to provocation by the deceased – would ensure that the jury could consider any relevant mitigating evidence. *Id.* at 26-27. The brief did not claim that the future-dangerousness special issue was designed to meet any of the above purposes, only incapacitation.

[19] The brief foreshadowed Justice Stevens's plurality opinion: it compared the task of predicting future danger in the special issue to other predictions "judges and juries time and time again make . . . in both criminal and civil cases concerning events which *are likely to occur*." *Id.* at 30 (emphasis added).

[20] The test drew heavily on language from a CCA decision four months earlier in *Estrada*, 313 S.W.3d at 281. *See* Pet. App. at 18a.

incapacitate for the protection of society." *Jurek* Resp't Br. at 31.[21]

Under the court's new hypothetical test, future dangerousness may be assessed without a reality-based determination of the likelihood of future criminality by the defendant and the need for the protection of society.[22] In other words, there is no longer a literal assessment of whether the defendant

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[21] The CCA cited *Jurek* in support of its new conjectural test. Pet. App. at 17a n.19 (quoting *Jurek*, 428 U.S. at 274-76). In a lengthy footnote, the court quoted the passage in *Jurek* in which this Court compared jury predictions of future dangerousness to predictions concerning parole, sentencing, and bail. *Id.* (quoting *Jurek*, 428 U.S. at 274-76). The court then quoted *Jurek* for the unremarkable proposition that the jury must have before it "'all possible relevant information about the individual defendant whose fate it must determine.'" *Id.* (quoting *Jurek*, 428 U.S. at 274-76). The CCA concluded that this Court in *Jurek* "focused on the particular characteristics of the individual, not upon an outside entity to constrain or control the individual defendant." *Id.* at 18a n.19. The predictions of future danger to which this Court compared the special issue (bail, parole, sentencing), however, *all* require context-specific assessment. For example, as noted above, a trial judge assessing whether bail is appropriate would certainly consider where the defendant would reside during the pendency of the trial. In a later passage, the CCA's similar reliance on *Kansas v. Marsh*, 548 U.S. 163 (2006), is equally misplaced. Pet. App. at 19a & n.23.

[22] The CCA stated that "incapacitation is not the sole focus of the Legislature or of our death penalty precedents." Pet. App. at 19a. It was apparently unaware that the Attorney General had reviewed the legislative history of the statute in its brief to this Court in *Jurek*, and offered that history in support of its assurance that the future-dangerousness special issue would be used solely for incapacitation. *See Jurek* Resp't Br. at 25-29.

will be a danger in the future. Rather, the test requires the jury to make a number of imaginative leaps and decide "'whether a defendant would constitute a continuing threat *whether in or out of prison without regard to how long the defendant would actually spend in prison if sentenced to life.*'" Pet. App. at 18a (citing *Estrada*, 313 S.W.3d at 281) (internal quotation marks omitted) (emphasis added). The genuine likelihood of future criminality, the need to incapacitate to protect society, and the reality of a defendant's confinement and circumstances if allowed to live play no meaningful role in this analysis.[23]

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[23] The CCA's opinion states that the "likelihood that a defendant does not or will not pose a heightened risk of violence in the structured prison community is a relevant, indeed important criterion . . . ." Pet. App. at 20a. But, under this opinion, the weight of this criterion can fall only on the side showing future dangerousness. That is so because whenever a defendant is well behaved in prison, his conduct is *not* dispositive in that the special issue concerns his conduct "in or out of prison without regard to how long the defendant would actually spend in prison if sentenced to life." Pet. App. at 18a (internal quotation marks omitted). *See also* 29 RR 125-26 (State arguing that Petitioner poses a threat of hurting women and children if "you put him out in the street this minute and let him walk out of this courthouse" and that the jury should "consider the whole thing, free world and prison"); 27 RR 278-79 (similar questioning of petitioner's expert). Logically, then, this case law means that a defendant's good conduct in prison can never show he will *not* pose a threat of future danger, even if he will spend the rest of his life in prison. Yet when a defendant misbehaves or acts dangerously in prison, that conduct always weighs towards a finding of future dangerousness. *See, e.g., Williams v. State*, 273 S.W.3d 200, 214 (Tex.Crim.App. 2008) (finding sufficient evidence of future dangerousness and relying

In defending Texas's future-dangerousness special issue in *Jurek*, the Texas Attorney General rhetorically asked, "When the need to protect society through incapacitation is considered a legitimate goal of the death penalty, why should it be impermissible to ask the jury to determine that issue directly in an individual case so that the punishment may indeed be tailored to fit the criminal?" *Jurek* Resp't Br. at 31. The question for this Court now is this: where Texas has assured this Court that this special issue would be used merely for incapacitation, may the CCA now, consistent with the Constitution, measure a defendant's future dangerousness without regard to "how long the defendant would actually spend in prison if sentenced to life," and without regard to "the external restraints of incarceration"? Pet. App. at 18a (internal quotation marks and citation omitted). The purpose of this special issue, as represented by Texas in *Jurek*, simply cannot be squared with its application in this case.[24]

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on "violent behavior in jail" and "prison disciplinary reports"); *Masterson v. State*, 155 S.W.3d 167, 173 (Tex.Crim.App. 2005) (similar reliance on violence in jail); *Chambers v. State*, 866 S.W.2d 9, 17 (Tex.Crim.App. 1993) (similar). Under the CCA's opinion, this important "criterion" is merely a one-way ratchet favoring execution.

[24] The decision below, and *Estrada* on which it relied, are not isolated. *See, e.g., Robertson v. State*, No. AP-71224, 2011 WL 1161381, at *1 & n.8 (Tex.Crim.App. March 9, 2011) (not designated for publication) (restating abstract "character" test of decision below); *Ruiz v. State*, No. AP-75,968, 2011 WL 1168414, at *5 (Tex.Crim.App. March 2, 2011) (not designated for publication) ("[O]ur appellate review of the sufficiency of the

B. The CCA's New Future Dangerousness Test is Unconstitutionally Vague and Arbitrary and Capricious.

The CCA's new conjectural test, used to narrow the class of capital murderers eligible for the death penalty in Texas,[25] fails to provide the sentencer with the "specific and detailed guidance" mandated by the Eighth Amendment. *See Gregg*, 428 U.S. at 196. Therefore, it lends itself to arbitrary and capricious application and is unconstitutionally vague. *Maynard v. Cartwright*, 486 U.S. 356, 361-362 (1988) ("Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972).")

Neither jurors nor the CCA in appellate review can be expected to use this test to reliably distinguish between those convicted murderers who

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evidence to establish future dangerousness is not limited to the defendant's probable conduct within prison walls, even with the advent of life-without-parole as the exclusive alternative to the death penalty for capital offenders."); *Martinez v. State*, 327 S.W.3d 727, 735 (Tex.Crim.App. 2010) (similar). *See also Freeman v. State*, No. AP-76052, __ S.W.3d __, 2011 WL 891266, at *7 (Tex.Crim.App. March 16, 2011) (similar).

[25] *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008).

will be a future danger and those who will not.[26] Unlike the test this Court approved in *Jurek*, this test conveys no "common-sense core of meaning." *Jurek*, 428 U.S. at 278-79 (White, J., concurring). Hypothetically freed of every restraint, every capital murderer could be fairly categorized as having a "character for violence" and "internal restraints" insufficient to prevent him from acting violently. Pet. App. at 17a-18a. *See Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (holding that Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravator was impermissibly vague; "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'").[27]

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[26] *Jurek*, 428 U.S. at 276 ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.").

[27] *See also United States v. Davis*, 912 F. Supp. 938, 946 (E.D. La. 1996) (finding proposed non-statutory aggravating factor of "low rehabilitative potential" to be "too vague"); *Arnold v. State*, 224 S.E.2d 386, 391-92 (Ga. 1976) (finding aggravating circumstance that the "'murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions' . . . too vague and nonspecific to be applied evenhandedly"); *State v. David*, 468 So. 2d 1126, 1129-1130 (La. 1985) (invalidating aggravating circumstance of "significant" history of criminal conduct because "[a] person of ordinary sensibility could characterize almost any record of criminal activity as significant").

The test is worlds away from the "carefully defined standards that must narrow a sentencer's discretion to impose the death sentence." *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987) (citations omitted). It provides "'no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not.'" *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 313 (White, J, concurring)). Thus, the test fails to genuinely narrow the class of offenders eligible for death sentences. *See Arave v. Creech*, 507 U.S. 463, 474 (1993); *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

In sum, Coble's death sentence was based on a future-dangerousness test that allowed for standardless discretion. *See Furman*, 408 U.S. at 313-14 (White, J., concurring).

C. Coble's Case Presents an Excellent Opportunity for this Court to Review the CCA's Vague and Conjectural Test for Future Dangerousness.

The injustices of the CCA's switch from the fact-bound *Jurek* test to its vague, amorphous and conjectural test extend beyond this case. Texas leads the Nation in executions. *See generally* http://www.deathpenaltyinfo.org/state_by_state (as visited on April 11, 2011). Every inmate sentenced to death in Texas, although constitutionally entitled to prompt and searching judicial review of their sentences, *Jurek*, 428 U.S. at 276, will have their sentences reviewed under this new and unconstitutionally-vague standard. *See also* note 24, *supra*.

Further, this case presents an excellent opportunity to review the test. The issue was litigated in the court below, and the court squarely rested its new construction of the future dangerousness inquiry on this Court's constitutional analysis in *Jurek v. Texas* (as well as its decision in *Kansas v. Marsh*, 548 U.S. 163 (2006)). Pet. App. at 16a-20a.

CONCLUSION

For the foregoing reasons, Coble respectfully requests that this Court grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-76,019

BILLIE WAYNE COBLE, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM THE 54TH
JUDICIAL DISTRICT COURT
McLENNAN COUNTY

COCHRAN, J., delivered the opinion of the Court in which PRICE, WOMACK, JOHNSON, and HOLCOMB, JJ., joined. MEYERS, J., joined except for points of error 3 and 4. KELLER, P.J., filed a concurring opinion in which MEYERS and KEASLER, JJ., joined. HERVEY, J., concurred.

OPINION

Appellant was originally convicted in 1990 of capital murder for the shooting deaths of his wife's

mother, father, and brother. Based upon the jury's answers to the special punishment issues, the trial judge sentenced him to death. This Court upheld his conviction and sentence on direct appeal.[1] In 2007, the Fifth Circuit Court of Appeals granted habeas relief and remanded the case for a new trial on punishment.[2] On retrial in 2008, a second jury sentenced appellant to death. Appellant raises twenty-five points of error. Finding no reversible error, we affirm the judgment and sentence.

Factual Background

Karen Vicha was appellant's third wife. They were married in July 1988 and lived in a house down the road from her brother and across the street from her parents. Appellant was almost forty years old. The marriage quickly disintegrated,[3] and, after a year, Karen told appellant to move out. She wanted a divorce. Appellant attempted to talk her out of this decision and would randomly call her and show up at her work place.

Appellant then kidnapped Karen as a further effort to dissuade her from divorcing him. He hid in the trunk of her car while she was at a bar one evening with a girlfriend. When Karen started to drive home, appellant folded down the back seat and

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[1] *Coble v. State*, 871 S.W.2d 192 (Tex. Crim. App. 1993).

[2] *Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007).

[3] Karen was worried by appellant's sudden personality switches from calm to aggressive– "agitated and angry"–as well as his interest in watching young girls.

"popped out of the trunk with a knife." He jumped over the console, halfway into the front seat, and stuck the knife against Karen's ribs. He told her to keep driving until they came to a field. Karen stopped the car, and appellant said that he if couldn't have her, then no one else could. He pulled out a roll of black electrical tape, but Karen kept talking, and, after about two hours, she convinced him that she would reconsider the divorce issue. He let her go, and she called her brother, Bobby, who was a police officer. Bobby told Karen to report the kidnapping.

After he arrested appellant for kidnapping Karen, Officer James Head looked in his patrol-car mirror and saw appellant staring at him with a look that "made the hair on the back of [his] head stand up." He got "the heebie-jeebies." Appellant muttered something like "They're going to be sorry." Officer Head called Karen's brother, Bobby, and warned him about appellant. When appellant was released on bail for the kidnapping charge, Bobby got Karen a German shepherd for protection. A few days later, appellant told Karen, "Oh, I see you–you've got a dog now. . . . [T]hat's a big mean dog you've got." Shortly thereafter, Karen found the dog lying dead in front of her house.

Nine days after he had kidnapped Karen, appellant went to her house in the early afternoon. As Karen's three daughters each came home from school along with Bobby's son,[4] appellant handcuffed

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[4] All four children, ages 16, 14, 11, and 10, testified that they had liked appellant prior to the murders.

them, tied up their feet, and taped their mouths closed. Karen's oldest daughter testified that she heard appellant cut the telephone lines. Then he left to ambush and shoot Karen's father, mother, and brother Bobby as each of them came home.[5] Appellant returned to Karen's house after the triple killings and waited for his wife to come home from work. He told the children, "I wish I had blown you away like I intended to." When Karen arrived, appellant came out of one of the bedrooms with a gun. Appellant said, "Karen, I've killed your momma and your daddy and your brother, and they are all dead, and nobody is going to come help you now." She didn't believe him, so appellant showed her Bobby's gun lying on the kitchen table and pulled the curtains so she could see her father's truck parked behind the house. He showed her $1,000 in cash that he had taken from her mother. Appellant told Karen that she was lucky that he hadn't molested her daughters, and he told her to kiss them good-bye. She did. He made her put on handcuffs.

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[5] Karen's father, the first victim, was found inside his home, covered with blankets and towels. Karen's mother was found in her garage. Bobby was found in his car in his garage.

Later that day, appellant told Karen that her brother was tough. "He put up one hell of a fight. . . . I chased him down the road one way, and I chased him back. And then I shot him, and he was going for the gun in his car. And he wouldn't die. . . . So, finally I had to blow a hole that big in his neck." Appellant also told Karen that he "really hated to do that to your mom. But when she found out about your dad, she just went crazy."

Karen talked appellant into leaving the house and taking her with him.[6] He said he was going to take her away for a few weeks and torture her.[7]

As appellant drove, Karen tried to escape by freeing one hand from the handcuffs and grabbing at the steering wheel, making the car swerve into a ditch. She grabbed one of appellant's guns, pointed it at his stomach, and pulled the trigger, but nothing happened. Then Karen and appellant fought over the gun, with appellant repeatedly pulling the trigger, but still the gun did not fire. Appellant pistol-whipped Karen until she couldn't see for all of the blood on her face. A woman passerby started shouting at appellant, "[W]hat are you trying to do to that woman," so appellant drove the car out of the ditch as Karen lay in the passenger seat. He shouted at her that if she got blood on his clothes, he would kill her. But he was also rubbing her between her legs as he drove. He told her that his reputation was

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[6] While Karen and appellant were still at her house, Bobby's girlfriend dropped by and saw Karen in handcuffs. She then went to Bobby's house and called Karen's uncle to tell him about seeing Karen in handcuffs. After that call, she looked around Bobby's house and saw blood everywhere, plants and furniture up-ended, and general disarray. She called the sheriff's office. Officers then came to Karen's house, talked to the four children, found the bodies of the three victims, and started the hunt for appellant.

[7] Karen testified that when she came to a court hearing in 1998, appellant kept turning around and smiling at her with "a wicked evil grin." Even in 2008, she was still scared of him and felt that he was a continuing threat to her.

ruined because she had had him arrested and his name was in the papers.

He drove to a deserted field in Bosque County where he threatened to rape her. After dark, he drove out of the field, but they passed a sheriff's patrol car which turned around to follow them. Appellant grabbed a knife and started stabbing Karen's chin, forehead, and nose, as he was driving. Appellant said that he did not want to die in prison, so he "floored it" and rammed into a parked car. After the crash, appellant turned to Karen and said, "I guess now you'll get a new car." Both appellant and Karen were injured in the crash. Officers had to cut the car door open to get Karen out. Appellant was found with Karen's father's watch and wallet, as well as .37 and .38 caliber revolvers.

Although appellant was forty years old when he committed this triple murder, the State's evidence showed that he was no stranger to violence. He had a long history of brutalizing and molesting women. Appellant beat both of his former wives and molested several young girls, including relatives.

His first wife, Pam Woolley, testified that they were married in 1970 when appellant was twenty-two. They had two children, but their marriage started downhill after two years. By 1974, appellant had become violent, and he used to beat her on the head so that her hair would hide the marks.[8] Pam said that appellant could go from

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[8] He also threw a plate at Pam when she cooked something he did not like; he knocked her to the floor with an open-hand slap; he hit her on the back with a baseball bat so hard that

normal to extremely angry in a split second, and he always blamed her for his violent acts. Appellant told her that if she ever filed for divorce, he would "fix her" so no other man would look at her again.

During this ten-year marriage, appellant molested Pam's younger sister and punched her on the mouth, "busting" her lip. He molested his children's thirteen-year-old babysitter while teaching her how to water ski. He groped the breast of another neighborhood girl. In 1979, when appellant was thirty, he raped his cousin who was about fifteen at the time. When appellant's niece was fifteen, he grabbed her ankles as she sat in a chair wearing a nightgown, spread open her legs, and gestured with his tongue as if he were performing oral sex on her. Later that same day, he forcibly kissed her and then threw her a $5 bill.

Appellant married Candy Ryan, his second wife, when he was thirty-five and she was eighteen. After one year of marriage, appellant started physically abusing her. He regularly hit her on the head. Once he grabbed her by the hair and repeatedly hit her against the cabinet and floor. After she dared to throw something at him, he hit her with a sledge hammer. Candy said that appellant had a "switch-type" personality–changing from sweet to nasty in a split-second. He stalked her, both during and after their marriage. He would sit in his car outside the gas station where Candy

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she had to go the hospital; and he sat on her chest and punched her in the face, breaking her nose.

worked, and, if a customer stayed inside too long, appellant came in and gave the customer an intimidating look. After Candy left appellant, he would call her late at night and tell her where she had been, whom she had been with, and what she had been doing. Appellant threatened Candy's father when he tried to help Candy leave.

Appellant's childhood did not augur well for his future. His earliest years were spent in the custody of an alcoholic stepfather who worked only periodically and a sickly, withdrawn, and depressed mother. When appellant was four, his mother was institutionalized in the Austin State Hospital with a psychoneurotic disorder. Appellant, his brother, and his older sister were sent to the Corsicana State Home for Children. Because of her promiscuous acting-out, appellant's older sister was sent to a convent school, and his problematic older brother was placed under the supervision of the Waco Probation Department. Appellant remained at the Home for twelve years.

When appellant was fifteen, a psychiatrist, Dr. Hodges, evaluated him and concluded that he was paranoid, distant, and impulsive; he showed poor self-control, displayed hostility to women, and blamed others for his own bad conduct. Dr. Hodges's impression was that appellant "represent[ed] a sociopathic personality disturbance of the dissocial type." People with this diagnosis gratify their own desires without regard for the cost to others. Appellant's "long term prognosis [did] not look good."

At age seventeen, appellant joined the Marine Corps and was sent to Vietnam. Although he

received an honorable discharge after his four-year tour of duty, he was not recommended for re-enlistment because of a series of violations and convictions. He married his first wife shortly after he left the Marines.

Dr. Richard Coons, a psychiatrist, had testified at appellant's 1990 trial that he would be a future danger. Dr. Coons testified at the 2008 retrial that appellant would still be a future danger even though appellant did not have a single disciplinary report for the eighteen years that he had been on death row. Dr. Coons explained this discrepancy by stating that all those on death row have an incentive to behave because their convictions are on appeal, and thus they are less violent than they would be in the general prison population.

Appellant called several witnesses to attest to his prison reformation and lack of violence for the entire time that he had been on death row. According to one fellow inmate, appellant was well liked by everyone; he was always even-tempered and had the ability to "talk sense" into some of the more violent inmates. He said that appellant had organized a sports league at the Ellis Unit and that he helped inmates write letters and would read them their letters from family members. After Death Row was moved to the Polunsky Unit, appellant's behavior was the same; he was always helpful and upbeat.

Another inmate testified that appellant would take people "under his wing" and help the "agitated" ones. He stated that, while at the Ellis Unit, appellant was an SSI, which was like a trustee, and

would often walk around with female officers. A third inmate testified that appellant was generous and gave commissary items to other inmates. A fourth inmate said that appellant helped him to learn English and to file a federal habeas petition. Appellant helped mentally-retarded inmates and was known for his respect for the law and God.

Appellant's older sister testified about their childhood and how appellant changed for the worse after coming home from Vietnam. She said that, shortly before the triple murders, she saw appellant throwing away many of his most prized possessions, and he began talking about his experiences in Vietnam, something he had never done before. On the day of the murders, appellant threw his truck keys at her and said that, if anything happened, the truck was hers. Appellant's son testified that appellant taught him welding, and he described his father as loving and helpful to others.

Dr. Cunningham, a forensic psychologist, testified that he had reviewed appellant's prison record which contained no disciplinary write-ups. Dr. Cunningham conducted a violence risk assessment of appellant. In his opinion, appellant had a very low probability of committing acts of violence while in prison.

Sufficiency of the Evidence to Prove Future Dangerousness

In his first and second points of error, appellant asserts that the evidence is legally and factually insufficient to support the jury's finding that there is a probability that he would commit

criminal acts of violence in the future. As appellant acknowledges, we have consistently held that we lack authority to conduct a factual sufficiency review of the jury's future-dangerousness verdict.[9] Appellant's arguments do not persuade us otherwise.

In assessing the legal sufficiency of the evidence to support future dangerousness, we "view the evidence in the light most favorable to the jury's findings and determine whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that [the defendant] would commit criminal acts of violence that would constitute a continuing threat to society."[10] Only if, after reviewing all of the record evidence, we conclude that a rational jury would necessarily have entertained a reasonable doubt about the defendant's future dangerousness, will we find that the evidence is legally insufficient.[11]

Appellant does not suggest that the evidence of his gruesome triple murder and his life-long history of violence toward women and young girls is–viewed in a vacuum–insufficient to support the

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[9] *See McGinn v. State*, 9 9 61 S.W.2d 161, 169 (Tex. Crim. App. 1998); *see also Williams v. State*, 270 S.W.3d 112, 138 (Tex. Crim. App. 2008) ("We do not apply a factual-sufficiency review to the jury's answer to the future-dangerousness special issue.").

[10] *Berry v. State*, 233 S.W.3d 847, 860 (Tex. Crim. App. 2007) (citation omitted).

[11] *Id.*

jury's finding. Clearly it is sufficient. Instead, he argues that, like Saul on the road to Damascus, he has experienced a character conversion while spending the last eighteen years in prison with a spotless disciplinary record. He has proven that he no longer poses any realistic threat of violence. This is, at first blush, a compelling argument.

Appellant notes that he was almost sixty years old and in poor health[12] at the time of the present trial. Appellant points to the evidence that shows that he has not merely stayed out of trouble for eighteen years in prison, but that he has made positive contributions to his prison society. He worked in the prison garment factory when he was housed in the Ellis Unit; he helped diffuse potential conflicts by talking "sense" into frustrated inmates; he formed a prison sports league; he gave commissary items to inmates who did not have money; he helped an inmate learn English and draft legal papers. Dr. Cunningham, his expert forensic psychologist, placed appellant in the lowest risk group for violence in prison. But, as the prosecutors pointed out, appellant had done many of these same positive things before the murders as well: he coached one of Karen's daughter's baseball teams; he fixed things around the house; he tended the garden; he praised Karen; he repaired their car; he helped organize a school sports banquet. Appellant's son, Gordon, testified that his father helped him with

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[12] Medical evidence showed that appellant has a history of heart disease, including a heart attack in 2004. He takes medications for high blood pressure and high cholesterol.

sports and took him fishing and hunting. He taught Gordon welding, electrical work, and a good work ethic. He was a very patient teacher and friendly, talkative, happy, and helpful to others.

Appellant agrees with the proposition that "the past is the best predictor of the future," and he relies upon a spotless, positive prison record as a realistic predictor of the future. Appellant concludes that, "[i]n light of [his] age and his prison record, . . . the only rational finding in this case is that he would not be a continuing threat to society. For that reason, his sentence must be vacated."[13]

This is the same argument that appellant made during the trial, and the jury must have taken it seriously because it asked for just three pieces of evidence during its deliberations, evidence that was directly relevant to this argument:

(1) Dr. Hodges's Austin State School psychiatric report from 1964 when appellant was 15. That report stated that appellant seemed paranoid and distant and "extremely hostile to women"; Dr. Hodges's impression was that "this boy represents a sociopathic personality disturbance of the dissocial type."[14] He concluded, "The long term

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[13] Appellant's Brief at 31.

[14] During the psychiatric interview, appellant "talked at some length about [a] fairly involved series of thefts and many anti-social acts such as stealing the ball bearings out of other children's bicycles so the wheels would not roll because he did not have a bicycle." Appellant told Dr. Hodges about "several

prognosis does not look good." (2) The military medical record from appellant's 1967 self-inflicted stabbing wound in his thigh after he had a fight with his girlfriend.[15] According to the military doctor, appellant "revealed

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thefts and [a] burglary in which he and his brother were suspected which he never admitted to the police but which he readily told me about during the interview." The penultimate paragraph of Dr. Hodges's report reads,

> [Appellant] seemed rather paranoid, distant, and deliberately non-smiling, as if he must deliberately keep people away from him to avoid the hurt from further rejection and hostility. He said that he did have some friends, but throughout the interview he seemed extremely hostile to women, made very deprecating remarks about them, and in general seemed to have a very low opinion of women. For instance, he told of beating up a young girl in the classroom because she said something smart to him, and he seemed impulsive, had poor controls, a very low self-esteem and he seemed to project a great deal of responsibility for his own actions on other people.

[15] The medical report set out appellant's explanation for the injury: According to the patient, his fiancée came from Texas so that he and she could become married. He had arrived from Da Nang and had met her and she was in an apartment with another fellow. The patient thought that his fiancée was having an affair with this other fellow and he became so angry and enraged that he threatened to kill him and also threatened to kill his fiancée. He stated that while he was involved in a fight, he picked up a knife and accidentally stabbed himself in the right thigh. His previous story, upon admission, was that he attempted to kill himself and was trying to stab himself in the abdomen and missed, finally stabbing himself in the right thigh.

evidence of lifelong maladjustment." On the hospital ward he was "hostile and belligerent" and only slowly "began to conform to the ward milieu."

(3) The pictures and cards that appellant had in his death row cell. These included numerous pictures of scantily clad young women and girls–young gymnasts and skaters–as well as romantic cards and photographs from a female pen pal.

The jury had also heard from several different sources about appellant's mercurial moods: one moment calm and sweet, the next moment in a towering rage.[16]

The jury also heard evidence that appellant, after all his time on death row, was still hostile to women. Karen testified that when she appeared for a hearing in 1998, almost ten years after appellant's original conviction, appellant "turned around and watched me sit down. And then, after that, he kept turning around and looking at me and grinning." It was a "weird evil grin." Karen "called it to the Judge's attention, and then he told him to stop. And then, he did it again. And [the judge] told him–I

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[16] Karen testified that she was really scared when she and appellant were in the Bosque County field after the murders because appellant would veer from pistol-whipping her and threatening to kill her to wanting to carry her over the brambles in the field so she wouldn't stumble and hurt her bare feet.

think his words were, I have to admonish you for that and I'll have to call you in contempt if you don't stop it." According to Karen, appellant had that same grin when she testified at the 2008 trial.

Appellant's attorney explained at trial that, "I'm not saying Bill Coble is a different person–okay–than he was in 1989. But you can see that he's made changes. You can see that he has adapted himself to prison environment, that[] he's adapted himself to institutional life. That's very clear." That is clear; appellant has adapted very well to prison life, but that fact, by itself, does not resolve the special issue:

> Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[17]

This question is essentially a normative one as the Legislature declined to specify a particular level of risk or probability of violence.[18] But the "future

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[17] TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

[18] *See Jurek v. State*, 522 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., concurring and dissenting). As Judge Odom complained, the Legislature declined to specify any particular level of probability in this special issue:

> What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a "probability" that he will perform certain acts in the future? Did it mean, as the words read, is there *a* probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability,

dangerousness" special issue ensures that no defendant, regardless of how heinous his capital crime, will be sentenced to death unless the jury finds that he poses a real threat of future violence.

The special issue focuses upon the character for violence of the particular individual, not merely the quantity or quality of the institutional restraints put on that person.[19] As we recently stated in *Estrada v.*

> yet it is some probability, *a* probability, and no one would say it is no probability or not a probability. It has been written: "It is probable that many things will happen contrary to probability," and "A thousand probabilities do not make one fact." The statute does not require a particular degree of probability but only directs that *some* probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster.

Id. (footnote omitted). But the Supreme Court disagreed with Judge Odom's constitutional concerns about the vague nature of "a probability" in the special issue. *See* note 19 *infra*.

[19] In upholding the Texas death penalty scheme and its special issues in *Jurek v. Texas*, 428 U.S. 262 (1976), the United States Supreme Court agreed that it is not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must

State,[20] "This Court's case law has construed the future dangerousness special issue to ask whether a defendant would constitute a continuing threat 'whether in or out of prison' without regard to how long the defendant would actually spend in prison if sentenced to life."[21] That is, this special issue focuses upon the internal restraints of the individual, not merely the external restraints of incarceration. It is

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determine. Texas law clearly assures that all such evidence will be adduced. *Id.* at 274-76. Thus, the Supreme Court focused on the particular characteristics of the individual defendant himself, not upon an outside entity to constrain or control the individual defendant. It did not disagree with this Court's original opinion in *Jurek* which had suggested possible types of evidence that jurors could use in assessing the probability that the defendant would commit future acts of violence:

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.

522 S.W.2d at 939-40. These are all factors that relate to the individual defendant, not to the efficacy of external controls.

[20] 313 S.W.3d 274 (Tex. Crim. App. 2010).

[21] *Id.* at 281.

theoretically possible to devise a prison environment so confining, isolated, and highly structured that virtually no one could have the opportunity to commit an act of violence, but incapacitation is not the sole focus of the Legislature or of our death penalty precedents.[22]

The Supreme Court has stated that "a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime."[23] Thus, juries appropriately focus upon the defendant's individual character for violence and the probability that he would commit acts of violence in whatever society he found himself.[24] Obviously, the

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[22] *See, e.g., Druery v. State*, 225 S.W.3d 491, 506-07 (Tex. Crim. App. 2007) ("State has the burden of proving beyond a reasonable doubt that there is a probability that [the defendant] would commit criminal acts of violence in the future, so as to constitute a continuing threat, whether in or out of prison"); *Smith v. State*, 898 S.W.2d 838, 846 (Tex. Crim. App. 1995) (plurality op.) (how long a life-sentenced capital defendant will spend in prison "is not proper even in the context of the [future-dangerousness] special issue because when a jury is considering whether a defendant represents a continuing threat to society, the term 'society' includes both the prison and non-prison populations").

[23] *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006).

[24] In proving future dangerousness, the State may rely on several factors, including but not limited to: (1) "the circumstances of the capital offense, including the defendant's state of mind and whether he was working alone or with other parties," (2) "the calculated nature of the defendant's acts,"

likelihood that a defendant does not or will not pose a heightened risk of violence in the structured prison community is a relevant, indeed important, criterion, but it is not the exclusive focus of the "future dangerousness" issue.

There is no denying appellant's impressive history of nonviolence in prison. Nor did the prosecutors at trial try to minimize that record. They noted that appellant has always done some good things in his life. The issue, however, is whether he is the same person–with the same character for sudden explosive violence–that he was when he was diagnosed at age 15 as having a "sociopathic personality disturbance of the dissocial type." Has his character changed since he was again diagnosed as having a lifelong history of maladjustment, belligerence and violence, when he was hospitalized at the age of 19 after fighting with his fiancee and stabbing himself in the thigh as a Marine? Was the "evil grin" Karen said that he gave her in court when appellant was fifty years old, and then again when he was sixty, indicative of a

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(3) "the forethought and deliberateness exhibited by the crime's execution," (4) "the existence of a prior criminal record, and the severity of the prior crimes," (5) "the defendant's age and personal circumstances at the time of the commission of the offense," (6) "whether the defendant was acting under duress or the domination of another at the time of the offense," (7) "psychiatric evidence," and (8) "character evidence." *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987). These factors do not constitute an exhaustive list. *Barnes v. State*, 876 S.W.2d 316, 322 (Tex. Crim. App. 1994). Significantly, these factors do not include the incapacitation capacity or competency of the particular prison system.

continuing animosity and character for brutality toward women? And did the pictures in his death row cell indicate an unnatural interest in young, athletic, scantily clad women for a sixty-year-old man with a heart condition? It was the jury's duty to assess appellant's present character for future dangerousness, and there was ample evidence to support its finding, beyond a reasonable doubt, that appellant had not experienced a conversion on the road to Damascus; rather, he had the same character for violence at age 60 that he did at ages 15, 19, and 40, despite his spotless prison record.[25]

The evidence is legally sufficient to support the jury's finding on the future dangerousness special issue. We overrule points of error one and two.

The Admissibility of Dr. Coons's Expert Testimony

In points of error three and four, appellant contends that Dr. Richard Coons's expert testimony concerning future dangerousness was not admissible

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[25] *See, e.g., Blue v. State*, 125 S.W.3d 491, 493-96 (Tex. Crim. App. 2003) (evidence sufficient to support jury's finding of future dangerousness despite defendant's evidence of nonviolence on death row for seven years before retrial and expert testimony that there was no more than a 48% statistical probability that defendant would commit acts of violence in prison because his prior violence was largely "relationship-driven"; evidence showed that defendant doused his girlfriend in gasoline and set her afire and he had a lengthy history of abusing other women, especially current and former girlfriends).

under Rule 702[26] because it was insufficiently reliable. We agree. In point of error five, appellant asserts that this type of evidence fails to meet the heightened reliability requirement of the Eighth Amendment, but the United States Supreme Court, in *Barefoot v. Estelle*,[27] rejected this argument, and we are required to follow binding precedent from that court on federal constitutional issues.[28]

A. The *Daubert/Kelly* Hearing.

At trial, appellant objected to Dr. Coons's proposed testimony and requested a *Daubert/Kelly*[29] hearing outside the presence of the jury. At that hearing, Dr. Coons testified that he is board certified in general psychiatry and has been practicing forensic psychiatry for thirty-one years. He has evaluated the competency or sanity of between 8,000 to 10,000 people, has performed 150 evaluations of

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[26] TEX. R. EVID. 702. Rule 702 reads, If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

[27] 463 U.S. 880 (1983).

[28] *Casarez v. State*, 913 S.W.2d 468, 475 n.10 (Tex. Crim. App. 1994) ("As judges on this honorable Court, we are bound to apply the United States Constitution as interpreted by the Supreme Court; we do not have the luxury or the liberty to ignore binding precedent.").

[29] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

"future dangerousness," and has testified in fifty trials as an expert.

Dr. Coons testified that psychiatric principles are commonly used when making determinations of a person's danger to himself or others in the context of involuntary psychiatric commitments. He said that he also relies upon psychiatric principles when he evaluates defendants for "future dangerousness" for capital murder trials. He repeatedly stated that "the best predictor of the future is the past" and noted that

> there are certain trends in people who are, in other words, habit patterns or personality patterns that–that we rely on. Um, and then, of course, there's the experience one has, the training and then the experience that one has in seeing quite a number of people and, uh–uh–watching classifications within various jails and so forth. Uh, those are kind of the principles or the things that are – opinions are based on.

Dr. Coons noted that there are some psychiatric diagnoses that are listed in the DSM,[30] such as antisocial personality disorder, that might indicate that a person is dangerous. But in this case, Dr. Coons relied on materials supplied by the District Attorney's Office.

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[30] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS.

Dr. Coons explained his standard methodology in assessing the issue of future dangerousness. For at least the past twenty years he has relied upon several different factors:

(1) The person's history of violence;

(2) The person's attitude toward violence;

(3) The particulars of the criminal offense;

(4) The person's personality and general behavior;

(5) The person's conscience; and

(6) Where the person will be–in or out of prison.

He assesses these factors based on the information that he has been given. This is his own personal methodology. He does not know whether others rely upon this method, and he does not know of any psychiatric or psychology books or articles that use his factors. But "[t]hese are matters that are discussed commonly at–at forensic meetings and among forensic psychiatrists. . . . [B]ut generally speaking, those are the–are the kinds of things that, uh, forensic psychiatrists would take into consideration in reaching an opinion." He doubts that his methodology is shared by everyone because different psychiatrists construct their own methodologies.

Dr. Coons stated that multiple psychiatrists would not necessarily agree on what is important in the first factor–looking to past conduct to predict future conduct. "I'm the one who's making the

decision–about whether it means something to me in terms of what I–my education or experience or background is." It is a subjective evaluation. When assessing past violence, Dr. Coons looks at its nature and context.

The same subjectivity is true for the second factor, a person's attitude about violence, as well as the third factor, the circumstances of the offense. Two different psychiatrists may come to different conclusions based on the same facts. Dr. Coons said that forensic psychiatrists develop an experiential body of knowledge and information and approach that helps them make their decisions. But Dr. Coons disagreed that it was "just a gut feeling."

When it comes to the fourth factor of personality and behavior, Dr. Coons looks to whether the crime was an aberration or whether that person has had a problem looking out for other people. Is he controlling? Manipulative? With the fifth factor, "conscience is involved in–in helping people control their behavior. And, I mean, really, I guess almost everybody knows that." There is no yardstick to measure it. With the final factor, Dr. Coons stated that if the person is on death row he will be less violent because "everybody that's on death row is on appeal by definition. And they tend to be on their good behavior. Uh, because if they–on their bad behavior and they get another trial or punishment, they uh–they know they'll hear about it

again. Their violence on death row or threats or whatever."[31]

All of these factors overlap and blend, but Dr. Coons knows of no book or article that discusses these factors or their overlap. He is not aware of any studies in psychiatric journals regarding the accuracy of long-term predictions into future violence in capital murder prosecutions or of any error rates concerning such predictions. Nor is he aware of any psychiatric studies which support the making of these predictions. Dr. Coons has never gone back and obtained records to try to check the accuracy of the "future dangerousness" predictions he has made in the past. He cannot tell what his accuracy rate is.

On redirect, the prosecutor asked Dr. Coons to read from a legal brief containing the names and titles of some articles on future dangerousness that had been filed in a different case, but Dr. Coons was not familiar with any of those articles.

Based on this testimony, the trial judge found that Dr. Coons qualified as an expert witness, that the subject matter of his testimony was an appropriate one for experts, and "that admitting the

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[31] Dr. Coons admitted that there is no objective way of differentiating between the two locations, death row versus general population, "[j]ust logic. . . . I think if you took a thousand psychiatrists and presented that to them, most people would say they have motivation to be on their better behavior if they're on death row." But Dr. Coons stated that there is no objective way of proving that proposition and he knows of no studies that support that theory.

expert testimony will actually assist the factfinder in deciding this case."

Dr. Coons then testified before the jury and, in response to a lengthy hypothetical setting out the salient features of appellant's life and crimes, opined that there was a probability that appellant would commit future acts of violence.

B. Legal Principles Concerning the Admission of Expert Psychiatric or Psychological Testimony Concerning Future Dangerousness.

The admission of expert testimony is reviewed on appeal for an abuse of discretion.[32] However, trial judges must act as a true "gatekeeper" when addressing the reliability and relevance of expert testimony.[33] In *Daubert*, the United States Supreme Court held that when the subject of the expert's testimony is "scientific knowledge," the basis of his testimony must be grounded in the accepted methods and procedures of science.[34] As that court explained,

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[32] *Lagrone v. State*, 942 S.W.2d 602, 616 (Tex. Crim. App. 1997) ("[T]he trial court's judgment regarding experts' qualifications and the admissibility of expert testimony is subject to an abuse of discretion standard of review.").

[33] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-92 (1993); *see also Kumho Tire v. Carmichael*, 526 U.S. 137, 147 (1999) ("gatekeeping" role assigned to trial judges under *Daubert* applies the same reliability standard to all "scientific," "technical," or "other specialized" matters within the scope of Rule 702).

[34] *Daubert*, 509 U.S. at 589-90.

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation–*i.e.*, "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.[35]

Four "general observations" guide the inquiry into scientific reliability: (1) falsifiability; (2) peer review and publication; (3) the existence of methodological standards, including the error rate; and (4) general acceptance within the relevant scientific field.[36] The goal of these "flexible" guidelines is to evaluate the admissibility of expert testimony by the standards that comparable experts within the same scientific field use in evaluating each other's professional work.[37]

In *Kelly v. State*,[38] this Court adopted several procedural and substantive limitations upon the admission of expert scientific testimony to ensure that unreliable expertise would be excluded from the jury's consideration.[39] Under *Kelly*, a trial judge

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[35] *Id.* at 590.

[36] *Id.* at 593-94.

[37] *See id.*

[38] 824 S.W.2d 568 (Tex. Crim. App. 1992).

[39] *Id.* at 572-73.

must, upon request, conduct a "gatekeeping" hearing outside the presence of the jury to determine whether scientific evidence is sufficiently reliable[40] and relevant[41] to help the jury in reaching an

accurate result. Then the judge must decide whether, on balance, that expert testimony might nonetheless be unhelpful or distracting for other

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[40] In *Kelly*, we set out the following list of nonexclusive factors that a trial court could consider in determining scientific reliability:

(1) The extent to which the underlying theory and technique are accepted as valid by the relevant scientific community;

(2) The qualifications of the testifying expert;

(3) The existence of literature supporting or rejecting the underlying scientific theory and technique;

(4) The potential error rate;

(5) The availability of other experts to test and evaluate the technique;

(6) The clarity with which the underlying scientific theory and technique can be explained to the court; and

(7) The experience and skill of the person who applied the technique in this case.

Id. at 573.

[41] In *Jordan v. State*, 928 S.W.2d 550, 553-54 n.4 (Tex. Crim. App. 1996), we discussed the "relevance" prong of the gatekeeping analysis as the closeness of the "fit" between the scientific evidence and the fact to which it is offered. "Whether evidence 'will assist the trier of fact' and is sufficiently tied to the facts of the case is a simpler, more straight-forward matter to establish than whether the evidence is sufficiently grounded in science to be reliable." *Id.* at 555.

reasons.[42] To be considered reliable, evidence from a scientific theory must satisfy three criteria: "(a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question."[43] The trial court's essential gatekeeping role is to ensure that evidence that is unreliable because it lacks a basis in sound scientific methodology is not admitted.[44]

Forensic psychiatry is certainly a science;[45] as Dr. Coons stated, it is practiced solely by those with a medical degree.[46] It may be a "soft science," but

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[42] *Kelly*, 824 S.W.2d at 572.

[43] *Id.* at 573.

[44] *Hartman v. State*, 946 S.W.2d 60, 63 (Tex. Crim. App. 1997).

[45] Forensic psychiatry is defined as "the branch of medicine that deals with disorders of the mind and their relation to legal principles." Thomas G. Gutheil, LEGAL ISSUES IN PSYCHIATRY, IN COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/VI 2747 (Harold I. Kaplan & Benjamin J. Sadock eds., 1995). The official definition of forensic psychiatry, promulgated by the American Board of Forensic Psychiatry and adopted in the Ethical Code of the American Academy of Psychiatry and the Law, is "a subspecialty of psychiatry in which scientific and clinical expertise is applied in legal contexts involving civil, criminal, correctional, regulatory or legislative matters, and in specialized clinical consultations in areas such as risk assessment or employment. These guidelines apply to psychiatrists practicing in a forensic role." *Ethics Guidelines for the Practice of Forensic Psychiatry* (Am. Acad. Psychiatry & L. May 2005).

[46] There is some empirical evidence that jurors tend to rate medical expertise higher than "mere" scientific evidence, such that when the information is identical, jurors rate the testimony from a psychiatrist, a medical doctor, as more

trial courts, in their gatekeeping function, must ensure that the expertise is not only soft, but that it is science as well.[47] "Soft" science does not mean soft standards.[48] When "soft" sciences are at issue, the trial court must inquire "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field."[49]

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persuasive than that from a psychologist. *See* J. Greenberg & A. Wursten, *The Psychologist and the Psychiatrist as Expert Witnesses: Perceived Credibility and Influence*, 19 PROF. PSYCHOL. RES. & PRAC. 373, 378 (1988). This might be termed "the Marcus Welby Effect" from the 1970's television series of the same name.

[47] *See, e.g., Holiday v. State*, No. AP-74,446-AP-74,448, 2006 WL 288661 *1 (Tex. Crim. App. February 8, 2006) (Womack, J., dissenting) (not designated for publication) ("If it cannot be validated, it's not science. Not even soft science. It may be soft, as many things are, but it's not science.").

[48] *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997) ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better.").

[49] *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) (upholding the admission of expert testimony by a special agent in the Behavioral Sciences unit of the FBI concerning future dangerousness in a capital murder trial). Although *Nenno* dealt with the admission of expert testimony concerning future dangerousness, it dealt with testimony by a layman

This inquiry is somewhat more flexible than the *Kelly* factors applicable to Newtonian and medical science.[50] "The general principles announced in *Kelly* (and *Daubert*) apply, but the specific factors outlined in those cases may or may not apply depending upon the context."[51] Under either *Daubert/Kelly* or *Nenno*, reliability should be evaluated by reference to the standards applicable to the particular professional field in question.[52]

Appellant does not quarrel with the first prong– the legitimacy of the field of forensic psychiatry, nor, apparently, with the second prong– Dr. Coons's testimony is within the scope of forensic psychiatry, but he contends that Dr. Coons's testimony did not properly rely upon the accepted principles of forensic psychiatry, at least as far as those principles apply to the prediction of long-term future dangerousness.

While the United States Supreme Court (as well as other American courts) has recognized the fallibility of psychiatric assessments of future dangerousness, it nevertheless acknowledged the necessary reliance on psychiatry to assist in judicial

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whose analysis was based on his experience studying sexual victimization of children. *Id.* at 562.

[50] *Id.* at 561.

[51] *Id.* at 560

[52] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (*Daubert* requires the trial court to assure itself that the experience-based expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").

decisionmaking.[53] We reaffirm that such expert

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[53] *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983). The dissent in *Barefoot* noted that the American Psychiatric Association, in an *amicus curiae* brief, estimated that two out of three predictions of long-term future violence made by psychiatrists are wrong. *Id.* at 920 (Blackmun, J., dissenting). More recent psychiatric and legal articles have reached a similar conclusion, although some conclude that the accuracy of clinicians' predictions may now be slightly better than chance when they also use risk assessment and actuarial tools. *See*, Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research*, 4 PSYCHOLOGY, PUBLIC POLICY AND LAW 1226, 1240 (1998) (stating that mental health clinicians' "future dangerousness" predictions fail to meet the scientific evidentiary standards in *Daubert;* noting that the stereotypes that mental health practitioners have of dangerous individuals are likely to be inaccurate and contain many attributes that are not linked to future danger); Grant H. Morris, *Defining Dangerousness: Risking a Dangerousness Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 85-86 (1999) ("More than twenty years ago, Alan Stone acknowledged that psychiatrists cannot predict whether a person will engage in dangerous behavior with a certainty, or beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. As to clinically-based predictions of dangerousness, the passage of time has not altered the accuracy of Stone's judgment.") (footnote omitted); William Gardner, Charles W. Lidz, Edward P. Mulvey, & Esther C. Shaw, *Clinical Versus Actuarial Predictions of Violence in Patients With Mental Illness*, 64 J. OF CONSULTING AND CLINICAL PSYCH. 602, 608-09 (1996) (suggesting that mental health practitioners are moderately better than chance in predicting future dangerousness based on recent estimates of their use of sophisticated statistical analysis techniques); John Monahan & Henry Steadman, VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 109-10 (University of Chicago Press 1994) (mental health practitioners are generally unaware of the relevance of base

testimony may, in a particular case, be admissible under Rule 702 and helpful to the jury in a capital

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rates of violence and thus greatly overestimate the likelihood that a specific individual will commit future violent acts), Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. & L. 267, 280- 81 (2001) (stating that mental health practitioners make inaccurate future violence predictions, they lack training in making such predictions, and their predictions are biased by their reliance on several cognitive heuristics which cause them to overestimate rates of future violence, but noting that the "development of actuarial instruments specifically designed to forecast risk of future dangerousness has significantly improved the accuracy of predictions of future violence"). In summing up the findings of three other researchers spanning the years from 1982 to 2004, one group of authors stated:

> In making long-term predictive judgements [of dangerousness], however, pure clinical decisionmakers are inaccurate for a number of reasons. Reasons for mental health practitioners' errors include such problems as (a) ignoring base rate information (the failure to take into account the normal level at which an event is likely to occur), (b) assigning non-optimal weights to factors (combining factors in manner that is subjectively appealing rather than empirically derived), and © employing the representativeness heuristic (the tendency to make decisions or judge information in a manner that fits our preconceived categories or stereotypes of a situation).

Daniel A. Krauss, Joel D. Lieberman, & Jodi Olson, The Effects of Rational and Experiential Information Processing of Expert Testimony in Death Penalty Cases, 22 BEHAV. SCI. LAW 801, 803 (2004).

murder trial.[54] However, the burden is on the proponent of such psychiatric testimony to establish its admissibility in each individual case.[55] Science is

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[54] At the time *Barefoot* was decided, and at the time Texas trial courts began admitting expert psychiatric and psychological testimony of "future dangerousness," the Supreme Court had not yet decided *Daubert*, and this Court had not yet decided *Kelly* or *Nenno*. Those three cases have significantly altered the evidentiary threshold requirements of reliability and relevance of any expert's testimony, including psychiatric or psychological expertise. Some have criticized the courts for failing to apply the standards set out in *Daubert* and *Kelly* to psychiatric testimony offered to prove future dangerousness in capital sentencing. *See, e.g., Flores v. Johnson*, 210 F.3d 456, 464-65 (5th Cir. 2000) (Garza, J., concurring) ("The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific. It is as true today as it was in 1983 that '[n]either the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right.' . . . On the basis of any evidence thus far presented to a court, it appears that the use of psychiatric evidence to predict a murderer's 'future dangerousness' fails all five *Daubert* factors. . . . Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness.").

[55] *See Hernandez v. State*, 116 S.W.3d 26, 30-31 (Tex. Crim. App. 2003) ("The State had the burden of proof at trial . . . to show, by clear and convincing evidence, that the ADx analyzer is a reliable method of determining the presence of marijuana in a person's body. It failed to offer *any* testimony, *any* scientific material, or *any* published judicial opinions from which the trial court might take judicial notice of its scientific reliability.") (footnote omitted); *Kelly v. State*, 824 S.W.2d 568,

constantly evolving and, therefore, the Rule 702-703 "gatekeeping" standards of the trial court must keep up with the most current understanding of any scientific endeavor, including the field of forensic psychiatry and its professional methodology of assessing long-term future dangerousness.[56] The

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573 (Tex. Crim. App. 1992) ("before novel scientific evidence may be admitted under Rule 702, the proponent must persuade the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant"); *see also Daubert*, 509 U.S. at 592 93 ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.") (footnotes omitted).

[56] The State argues that this Court has previously upheld the admission of Dr. Coons's "future dangerousness" testimony in many cases, most recently in *Ramey v. State*, No. AP- 75,678, 2009 Tex. Crim. App. Unpub. LEXIS 124, *44-45 (Tex. Crim. App. Feb. 11, 2009) (not designated for publication), and *Espada v. State*, No. AP-75,219, 2008 Tex. Crim. App. Unpub. LEXIS 806, *21-27 (Tex. Crim. App. Nov. 5, 2008) (not designated for publication). These cases are unpublished and therefore cannot be cited as precedent. At any rate, courts do not "grandfather in" expert testimony in a particular field or by a particular witness simply because the court has admitted expert testimony in that field or by that witness in the past. *See Hernandez*, 116 S.W.3d at 30 (fact that trial court may have admitted testimony from particular expert witness before does not mean that evidence is reliable in the particular case). Furthermore, each record and the *Daubert/Kelly* hearing of each record must be examined on its own merits. We cannot tell what the precise content of the *Daubert/Kelly* gatekeeping hearing, if any, was in these other cases, nor could we rely

objective of the "gatekeeping" requirement is to make certain that an expert employs the same professional standards of intellectual rigor in the courtroom as is expected in the practice of the relevant field.[57] The validity of the expert's conclusions depends upon the soundness of the methodology.[58]

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upon the content of such a hearing in another case in assessing the admissibility of Dr. Coons's testimony in this case, unless the former testimony were introduced at the current gatekeeping hearing.

[57] *See* Paul C. Gianelli, Daubert: *Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999, 2001-03 (1994); *see Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319-20 (9th Cir. 1995) ("*Daubert II*") (if expert evidence is not based upon independent professional research outside of its possible litigation purposes, courts should look for "other objective, verifiable evidence that the testimony is based on 'scientifically valid principles'"; this requirement may be met by "precisely [explaining] how [the experts] went about reaching their conclusions and point[ing] to some objective source–a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like–to show that they have followed the scientific method, as it practiced by (at least) a recognized minority of scientists in their field.").

[58] *See Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009) ("When expert testimony is involved, courts are to rigorously examine the validity of facts and assumptions on which the testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions.").

C. The Application of *Daubert/Kelly* and *Nenno* Principles in This Case.

As the Seventh Circuit observed in *Rosen v. Ciba-Geigy Corp.*,[59] "under the regime of *Daubert* a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."[60] Here, there is no question that Dr. Coons is a genuine forensic psychiatrist with a lengthy medical career, but the issue under Rule 702 is whether his "future dangerousness" testimony is based upon the scientific principles of forensic psychiatry.

From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area.[61] There is no objective source material in this record to substantiate Dr. Coons's methodology as one that is appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the

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[59] 78 F.3d 316 (7th Cir. 1996).

[60] *Id.* at 318 (internal citation omitted).

[61] *See* Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 129 (1984) ("a clinician unfamiliar with the research literature on dangerousness prediction should not be considered qualified to offer a clinical prediction of dangerousness, regardless of her educational or experiential attainments.") (citing George W. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 175-77 (1977)).

principles involved in the field of psychiatry, but this is simply the *ipse dixit* of the witness.[62] Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions,[63] Dr.

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[62] *See Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999) ("Although expert opinion testimony often provides valuable evidence in a case, 'it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.'"); *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999) ("An expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts."); *see also General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (noting that "conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.").

[63] As early as 1974, the American Association Task Force on Clinical Aspects of the Violent Individual published a report assembling the then-current knowledge concerning violent persons and the clinical issues they present, including the evaluation and prediction of violent behavior. *See* AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL (APA TASK FORCE REPORT NO. 8, 1974) (concluding that "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists [to] . . . reliably predict future violence is unproved."). In recent years, actuarial predictions, based upon statistically analyzed data, have taken on greater

Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.

Dr. Coons stated that he relies upon a specific set of factors: history of violence,[64] attitude toward

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importance and achieved some professional acceptance in the field of predictions of future dangerousness, especially in the area of sexual offenders. *See generally* John Monahan, et. al., *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006) (discussing distinction between clinical and actuarial risk assessment which depends on actuarial instruments that measure risk of future violence); John Monahan, RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 7 (Oxford University Press 2001) (discussing the superiority of actuarial predictive methods to clinical predictive methods); William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCHOL. ASSESSMENT 19, 19 (2000) (finding that actuarial prediction techniques were, on average, ten percent more accurate than clinical predictions); Howard E. Barbaree et al., *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28 CRIM. JUST. & BEHAV. 490, 492 (2000) (discussing the accuracy of the Violence Risk Appraisal Guide at predicting recidivism by sex offenders); Mark Dolan and Mary Doyle, *Violence Risk Prediction: Clinical and Actuarial Measures and the Role of the Psychopathy Checklist*, 177 BRIT. J. PSYCH. 303, 305-09 (2000) (listing assessment instruments used for violence risk assessment in the mentally disordered and citing studies).

[64] At least some psychiatric literature supports this factor as highly predictive of future violence. *See* John W. Parry, et al., ABA COMM'N ON MENTAL HEALTH AND PHYSICAL DISABILITY LAW, NATIONAL BENCHBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 223 (1998) ("A history of past violence repeatedly has been shown to be one of the best predictors of violence."); Deidre Klassen & William A. O'Connor, *A Prospective Study of*

violence, the crime itself, personality and general behavior, conscience, and where the person will be (i.e., the free community, prison, or death row). These factors sound like common-sense ones that the jury would consider on its own,[65] but are they ones that the forensic psychiatric community accepts as valid?[66] Have these factors been empirically

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Predictors of Violence in Adult Male Mental Health Admissions, 12 LAW & HUM. BEHAV. 143, 152 & tbl. 1 (1988) (finding that a recent history of violent crime associated strongly with post release arrests in studies of men released from psychiatric hospitals). These are the types of professional sources and studies that a psychiatric expert could reasonably cite as support for his methodology, and the proponent could offer them into evidence so that an appellate court could rely upon them.

[65] Indeed, some researchers have found that "laypersons and the clinicians had few differences of opinion" about assessments of future dangerousness, but neither had much accuracy. Vernon L. Quinsey, et al., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK 62 (1998).

[66] In the early 1970s, one influential research clinician, Dr. Kozol, described the "dangerous" person as

> one who has actually inflicted or attempted to inflict serious physical injury on another person; harbors anger, hostility, and resentment; enjoys witnessing or inflicting suffering; lacks altruistic and compassionate concern for others; sees himself as a victim rather than as an aggressor; resents or rejects authority; is primarily concerned with his own satisfaction and with the relief of his own discomfort; is intolerant of frustration or delay of satisfaction; lacks control of his own impulses; has immature attitudes toward social responsibility; lacks insight into his own psychological structure; and distorts his

validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time?[67] Some of Dr. Coons's factors have great intuitive appeal to jurors and judges,[68] but are they actually

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perception of reality in accordance with his own wishes and needs.

Harry L. Kozol, Richard J. Boucher & Ralph F. Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371, 379 (1972). This description is not unlike that given by Dr. Coons about appellant, and it may be a valid assessment of a person who would likely be "dangerous" in the future, but there is nothing in this record that shows Dr. Coons relied upon the principles and methodology of Dr. Kozol or his colleagues.

[67] "One study of capital murderers commuted as a result of the *Furman* decision found that 188 murderers were paroled by the end of 1987, serving an average of 5.3 years in the outside community. Only one killed again, for a rate of .1% committing repeat homicides per year. Six of the 188 committed violent offenses, resulting in a violent recidivism rate of .6% per year." Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1255 (2000) (citing James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 24 (1989)). One does not know whether any psychiatric expert predicted that some or all of these capital murderers would constitute a future danger.

[68] If these factors are not scientifically appropriate ones for predicting future violence, then their intuitive appeal is doubly dangerous as the jury might accept such testimony uncritically. *See Flores v. Johnson*, 210 F.3d 456, 465-66 (5th Cir. 2000) (Garza, J., concurring) ("[T]he problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is

accurate predictors of future behavior? Dr. Coons forthrightly stated that "he does it his way" with his own methodology and has never gone back to see whether his prior predictions of future dangerousness have, in fact, been accurate. Although he had interviewed appellant before the first trial in 1990, Dr. Coons had lost his notes of that interview in a flood and apparently had no independent memory of that interview. He relied entirely upon the documentary materials given to him by the prosecution, including his 1989 report. Dr. Coons, therefore, did not perform any psychiatric assessment of appellant after his eighteen years of nonviolent behavior on death row, nor did he refer to any psychological testing that might have occurred in that time frame.

Based upon the specific problems and omissions cited above, we conclude that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly*

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introduced by one whose title and education (not to mention designation as an 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact."); *see also* C. Robert Showalter & Richard J. Bonnie, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULL. AM. ACAD. PSYCH. L. 159, 165 (1984) (noting that because jurors are already likely to believe that a defendant poses a future danger of violence, they will tend to overvalue expert predictions that confirm those beliefs).

gatekeeping hearing in this particular case.[69] We conclude that the trial judge therefore abused his discretion in admitting Dr. Coons's testimony before the jury.[70]

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[69] *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000) ("Under Rule 702, the proponent of scientific evidence must show, by clear and convincing proof, that the evidence he is proffering is sufficiently relevant and reliable to assist the jury in accurately understanding other evidence or in determining a fact in issue."; proponent of expertise on eyewitness reliability offered nothing more than his own testimony at gatekeeping hearing); *see also Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) ("Thus, the party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are based on the scientific method, and, therefore, are reliable. This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient.").

[70] *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) ("Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion."); *see also E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) ("Scientific evidence which is not grounded 'in the methods and procedures of science' is no more than 'subjective belief or unsupported speculation.' Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702.") (quoting *Daubert*, 509 U.S. at 590; citing *Kelly v. State*, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992)); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998).

D. Did Dr. Coons's Inadmissible Expert Testimony Affect Appellant's Substantial Rights to a Fair Sentencing Trial?

Having found error in the admission of Dr. Coons's expert testimony, we must decide whether that error affected appellant's substantial rights to a fair sentencing trial.[71] A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict.[72] But if the improperly admitted evidence did not influence the jury or had but a slight effect upon its deliberations, such non-constitutional error is harmless.[73] In making a harm analysis, we examine the entire trial record and calculate, as much as

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[71] TEX. R. APP. P. 44.2(b); *see King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (applying TEX. R. APP. P. 44.2(b) to erroneously admitted hearsay documents to prove future dangerousness in sentencing phase of capital murder trial; error harmless); *see also Garcia v. State*, 126 S.W.3d 921, 927-28 (Tex. Crim. App. 2004) (in capital murder sentencing phase, erroneously admitted hearsay statements by murder victim–defendant's wife–that defendant had physically and psychologically abused her was harmless error given the considerable amount of other evidence from which the jury could have concluded that defendant had been abusive toward his wife and more than ample evidence to support the jury's answer to the "future danger" special issue).

[72] *Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

[73] *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998) (a criminal conviction should not be reversed for non-constitutional error under TEX. R. APP. P. 44.2(b) if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect).

possible, the probable impact of the error upon the rest of the evidence.[74] We consider overwhelming evidence supporting the particular issue to which the erroneously admitted evidence was directed–here, the "future dangerousness" special issue–but that is only one factor in our harm analysis.[75] It is the responsibility of the appellate court to assess harm after reviewing the record, and the burden to demonstrate whether the appellant was harmed by a trial court error does not rest on either the appellant or the State.[76]

In his Brief, appellant cites articles that note the high persuasive value of "scientific" expert testimony, especially clinical psychological testimony concerning future dangerousness.[77]

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[74] *See Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000); *Miles v. State*, 918 S.W.2d 511, 517 (Tex. Crim. App. 1996).

[75] *Motilla v. State*, 78 S.W.3d 352, 356-58 (Tex. Crim. App. 2002).

[76] *Johnson v. State*, 43 S.W.3d 1, 5 (Tex. Crim. App. 2001).

[77] *See* CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 203, at 608-09 (3d ed. 1984); John W. Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 OR. L. REV. 349, 361 n.81 (1992) ("There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect"); Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. & L. 267, 305 (2001) (clinical psychological expert testimony concerning future dangerousness in mock trial setting had strong effect on jurors).

Indeed, some studies have shown that juror reliance on an expert's credentials is directly proportional to the complexity of the information represented: the more complex the information, the more the jury looks to the background, experience, and status of the expert himself rather than to the content of his testimony.[78] There is also some evidence that jurors value medical expertise higher than other scientific expertise; thus, even when the information is identical, jurors find evidence from a doctor more persuasive than the very same testimony from a psychologist.[79] Furthermore, evidence that corresponds to firmly held beliefs may be particularly persuasive to jurors.[80] Thus, an expert's appeal to the juror's own common sense may be considerably more persuasive than a counterintuitive and complex, but empirically verified, theory.

These studies and articles would support a determination that the erroneous admission of a psychiatrist's unreliable testimony concerning the

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[78] Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379, 379 (1996).

[79] Jeff Greenberg & April Wursten, The Psychologist and the Psychiatrist as Expert Witnesses: Perceived Credibility and Influence, 19 PROF. PSYCH. RES. & PRAC. 373, 378 (1988).

[80] *See* C. Robert Showalter & Richard J. Bonnie, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULL. AM. ACAD. PSYCH. & L. 159, 165 (1984) (noting that jurors tend to overvalue predictions that confirm their pre-existing beliefs).

defendant's future dangerousness affects a substantial right to a fair sentencing hearing under Tex. R. App. P. 44.2(b). However, each case must be examined on its own facts, taking into account the specific evidence and the probable impact of the erroneously admitted expert evidence upon the jury's decisionmaking in the particular case.

In this case, there was ample evidence that there was a probability that appellant would commit future acts of violence quite apart from Dr. Coons's testimony. And, as noted above, it was some of that independent evidence that the jury requested to see during its deliberations. First, the psychiatric interview and evaluation done by Dr. Hodges more than twenty years before the offense and forty years before the trial reached the same basic conclusion as Dr. Coons did concerning appellant's character and his animosity toward women. Dr. Hodges's 1964 interview and clinical evaluation was completed long before any possible motive to view the facts and events of appellant's later life through any "future dangerousness" litigation prism had arisen. Expertise that is developed entirely independent of litigation by professionals acting in their normal field is more likely to be considered reliable than expertise developed especially for trials.[81] The same

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[81] *See* FED. R. EVID. 702 advisory committee notes to 2000 amendments (noting that one factor courts have used both before and after *Daubert* in determining whether expert testimony is sufficiently reliable to be admitted is "Whether experts are 'proposing to testify to matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.'") (quoting *Daubert v.*

is true with the 1967 military medical report which noted appellant's "lifelong maladjustment" and his jealous violent rage when he thought that his fiancée was having an affair with someone else. Significantly, the jury asked to see these two reports during its deliberations; it did not ask to see Dr. Coons's 1989 report. We have often held that erroneously admitting evidence "will not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling."[82] Although neither Dr.

Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)). As the Ninth Circuit explained,

> That an expert testifies based on research he has conducted independent of the litigation provides important, objective proof that the research comports with the dictates of good science. For one thing, experts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration; when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests. Then, too, independent research carries its own indicia of reliability, as it is conducted, so to speak, in the usual course of business and must normally satisfy a variety of standards to attract funding and institutional support.

Id. (internal citations omitted).

[82] *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *see also Valle v. State*, 109 S.W.3d 500, 509 (Tex. Crim. App. 2003) ("An error [if any] in the admission of evidence is cured where the same evidence comes in elsewhere without objection.").

Hodges nor the military doctor specifically opined on whether there was a probability in 2008 that appellant would commit acts of future violence, their psychiatric and medical assessment of appellant's character for violence is remarkably similar to that of Dr. Coons.

Furthermore, Dr. Coons's testimony was rebutted and refuted by appellant's expert, Dr. Mark Cunningham, a forensic psychologist. Although Dr. Cunningham is not a medical doctor, he did win the 2005 Texas Psychology Association award for his outstanding contribution to science and, in 2006, he was awarded the American Psychological Association (APA) award for distinguished contributions to research in public policy. Both awards were for his research concerning factors that predict violence in prison and his research in capital sentencing. He is also among the 2,000-3,000 psychologists elected as a Fellow of the APA out of the 155,000 members. He has published a significant number of peer-reviewed studies and articles. He testified, with a PowerPoint slide presentation to illustrate,[83] about the violence risk assessment factors that he uses to assess the probability of future dangerousness in prison. His factors are based on research data from prisons, as well as other research and scholarly writings. He explained how his research is "scientific," replicable, and less subjective: "It's not based on my gut feeling

[83] His slides included statistical charts and numerous references to comprehensive scientific articles.

about something. It's based on what the data tells me. And so, it's accurate. It's reliable."

After explaining the various studies, data, and statistical analysis, Dr. Cunningham concluded that appellant fell within the lowest risk-of-violence category.[84] He criticized "the hypothetical inference" mode of predicting future dangerousness as

> entirely speculative. . . . That's just blind guessing unless those factors have been demonstrated to be

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[84] The American Psychiatric Association's 1974 Task Force report concluded, Predictions of "dangerousness" are judgments of a "relative risk" sort, statements of comparative probabilities that are usually quite low. All that may be reasonably concluded in most cases is that in the clinician's experience, and from his knowledge of the literature, some persons are at a comparatively higher risk for future violence than are others. APA Task Force Report, *supra* note 63 at 31.

> As Judge Johnson has noted in this same context, A probability that a single individual will engage in a given behavior does not exist. The probability that *does* exist is the likelihood that a person *like* that individual will engage in a given behavior. . . . The proceedings in capital trials are on much more stable ground if the future-dangerousness witnesses are questioned about the probability of future violence by a person who is *like* the defendant in, for example, background, criminal history, mental status, and demonstrated propensity for violence against others.

Allen v. State, No. AP-74,951, 2006 WL 1751227, *9 (Tex. Crim. App. June 28, 2006) (not designated for publication) (Johnson, J., concurring).

> predictive of violence in prison. Critically important. . . . That's the problem with not knowing the literature, without knowing anything about the scientific studies that have been done in this area is then you have no idea whether the factors that you're looking at are predictive of anything or not.

According to Dr. Cunningham, if "what you're doing is basing it on your own gut and you haven't done anything to check whether your gut reaction is correct or not, then your accuracy level never improves."

He pointed to appellant's first trial as an example of the "tea-leaf-reader" school of subjective clinical assessments. In that trial, Dr. James Grigson,[85] who used the same subjective methodology as Dr. Coons, testified that, in his opinion, appellant posed *no* risk of future violence: "[H]e said, the ladies and gentlemen of the jury are more likely to kill somebody in the future" than appellant. Dr. Coons, using that very same methodology and facts concerning appellant, came to exactly the opposite conclusion.[86] Dr. Cunningham

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[85] Dr. Grigson was nicknamed "Dr. Death" by the media and was one of the two psychiatrists whose "future dangerousness" testimony was at issue in *Barefoot v. Estelle*, 463 U.S. 880 (1983); *see Mines v. State*, 852 S.W.2d 941, 949 (Tex. Crim. App. 1992).

[86] Dr. Cunningham concluded, Both of those represent absurd unreliable conclusions based on a completely unreliable method. That's the benefit of using a subjective unreliable

also told the jury that the major psychological associations had criticized Dr. Coons and his methodology as "unreliable and inconsistent with the standard of practice." In sum, Dr. Cunningham refuted Dr. Coon's expertise and the whole "tea-leaf-reader" notion of clinical psychiatric predictions of future dangerousness.

Furthermore, the prosecution did not rely heavily upon Dr. Coons's testimony during its closing arguments. Instead, the prosecutor emphasized his position that appellant was exactly the same person that he was when he killed Karen's parents and her brother back in 1989. He had not changed a bit.[87] The prosecutor then went on to

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method is whatever case you go into you can say whatever you want, because it's based on reading tea leaves.

[87] The prosecutor's theory was that "[t]his is the same person 20 years later exactly. There is no difference." He explained, The evidence in this case, the evidence presented to you from the witness stand here and testified to shows that he has no remorse. He had no remorse on August 29, 1989, when he individually killed three people and then kidnapped Karen Vicha and told her all about what he'd done. He had no sorrow in that at all. And he–he simply–he doesn't have it. It's not here. It's not within him. And what did he do later after the unspeakable horror that he inflicted on her? There was a hearing in this court ten years later and she was sitting out there in the audience. This man turned and was glaring at her, giving her an evil smile ten years later after slaughtering her family and giving her heartache that lasts for a life. He's grinning at her. Is that any remorse? Ten years later he's the same person that did the killing.

And then in the courtroom during the trial last week, she told you that when she–after she burst into tears and was sobbing and looked at him, as you saw her do, he gave her the

recount evidence from the murders themselves and appellant's bragging to Karen afterwards. The prosecutor then turned to the topic of predicting future dangerousness:

> Can we predict a person's future? Well, we absolutely can. You heard what Dr. Hodges said. He made an analysis of it. He talked about how he had a dislike of women, how he had a low opinion of them. Did he? His conduct was absolutely borne out. And Dr. Hodges said the prognosis is poor, and it was, because this person ultimately cares only about himself.

He then recounted how Bobby's fellow officer had predicted that appellant would commit some violent act after he had been arrested for kidnapping Karen before the murders. He then turned briefly to Dr. Coons:

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same smile. I got you. I hurt you. Folks, this is the same man that committed those murders.

What's another thing we can prove? He has the same unnatural attachment to young girls that he did when he was out in the free world molesting them. You've heard that testimony. You've heard what he did. There's no questioning the evidence about that. And so now, what does he do in his jail cell? He's got pictures of -not pinups of 30-year-old women from Playboy. He's got pictures of young girls in various gymnast positions. He is the same person that was a molester and a murderer back on August 29, 1989.

> Dr. Coons examined–first he talked to [appellant] personally before the first trial in 1990. He interviewed him, then he gave his assessment of him. And the assessment is–sure, you deal with medical predictions and the training of psychiatrists but it's just common sense. If you don't have a conscience and you've committed dangerous violent acts and you've shown that you have no regard for human beings in any form unless it's something that serves you, of course, there's a probability that you will commit criminal acts of violence.

The prosecutor then referred to appellant's expert psychologist, Dr. Cunningham, and how he had called Karen biased for saying that appellant twice gave her an evil grin in two different court appearances. The prosecutor then returned to his theme of appellant's lack of conscience and how he had simply been restrained, not changed, in prison.

The defense, in its closing argument, quickly focused on the future dangerousness issue as well. Counsel argued that the statistical evidence that Dr. Cunningham had presented made it very difficult for the prosecution to prove that appellant would commit future acts of violence. He compared the two experts:

> I want to talk about Dr. Coons versus Dr. Cunningham, because it really does sort of come down to Dr. Coons versus Dr. Cunningham. Dr. Coons is

a likable guy. Dr. Coons does an excellent job of testifying. He seems to have a lot of horse sense. Okay. He seems to have a lot of common sense. That's totally true. Dr. Cunningham is extremely long-winded. Okay. He has a hard time sort of answering a question directly. I recognize those facts. But that's because he is a scientist.[88] All right. And Dr. Cunningham talked about being a scientist and what that means. What that means is, I don't just look at the evidence and make a wild guess. Okay. I'm not a tea-leaf reader. I'm not a guy who says, well, I'm just going to depend on my–my experience and say this person is a future danger–okay–without going back and checking my work, without quantifying things, without being able to say, you know, I'm correct to this certain quantum of correctness. . . . So he's a scientist. A scientist comes up with an idea, a theory. Okay. He tests that theory. He doesn't just test the theory, but he also gives his data to

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[88] Defense counsel had already explained why he had called Dr. Cunningham: "Because Dr. Cunningham is the leading scientist in this field. All right. Out of every scientist who is looking at these numbers, out of every scientist who is studying this issue, he's the leading guy."

other scientists to look at, so they can test his theory. Then he goes back and double-checks his work. Then he thinks, now, maybe there's a weakness in my own argument that I've already made. Let's go back and double-check that weakness and see it that changes our numbers or does that reinforce our numbers. All right. So that's what a scientist is supposed to do.

Do you remember Dr. Coons's testimony? Dr. Coons, do you check your work? Not really. Dr. Coons, do you remember going back and looking at the records of people that you have predicted are going to be a future dangerto see if they really were? Well, I'm sure I've done it, but I can't tell you who I've done it with. In other words, he's a guy who is completely uninterested in whether he's correct or not. . . .

. . . How can he ever get better? How can he establish for the jury that his opinion is reliable? He can't because he's not a scientist. He's a tea-leaf reader.

The defense then recapped Dr. Cunningham's testimony which had been that appellant posed an extremely low risk of committing future acts of violence because (1) he is well adjusted to institutional life; (2) he is sixty years old and thus has "aged out" of his violent years; (3) he has

performed many positive acts and developed a positive attitude toward fellow inmates; (4) he is serving a very long sentence and "40 years of tests" show that longterm inmates are statistically less likely to commit acts of aggression than are "shorttermers;" (5) he has a GED and additional work certificates; and (6) he has continuing family ties to the community. All of these factors are supported by "the numbers that exist in reality. These are the official numbers. So he's not making up the numbers. He's a scientist. He's just reporting what the data is." The defense concluded its discussion of "future dangerousness," with the statement that "Dr. Cunningham's conclusions are very appropriate and very reasonable and scientific and provable as opposed to Dr. Coons's conclusions, which are nonscientific and not provable. Okay. And even if they were provable, he hasn't bothered to go out and try to prove them." Counsel then moved on to the mitigation issue and appellant's miserable childhood and youth.

During his final argument, the prosecutor mentioned Dr. Coons very briefly by reminding the jury that another psychiatrist, Dr. Hodges, had talked to appellant back in 1964 and "he looked at him and listened to his answers" and reached the conclusion that appellant was "extremely hostile to women, very low opinion of women, has poor control, very low self-esteem. Projects a great deal of responsibility for his own actions on other people. It was Karen's fault that she got kidnapped. It was Karen's fault because she stood up to him. And it ruined his life. So it was her fault. And he had to

extract revenge on her and he did it in the most brutal, the most selfish way he possibly could." The prosecutor then referred to the military doctor's assessment from 1967, with both doctors reaching the "same common sense assessment" of appellant.

Based upon the complete record of this case, we find that the error in admitting Dr. Coons's testimony did not affect appellant's substantial right to a fair sentencing hearing because

(1) There was ample other evidence supporting a finding that there was a probability that appellant would commit future acts of violence;[89]

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[89] *See Motilla v. State*, 78 S.W.3d 352, 356-57 (Tex. Crim. App. 2002) (reiterating that "overwhelming evidence" of guilt is one consideration in deciding whether improper admission of evidence was harmful in a particular case); *Sanne v. State*, 609 S.W.2d 762, 773-74 (Tex. Crim. App. 1980) (erroneous admission of expert opinion testimony by forensic pathologist concerning "future dangerousness" in capital murder trial was harmless even under constitutional harmless error rule because there was ample evidence of defendant's prior criminal acts of violence and facts of capital murder; other evidence demonstrated defendant's "antisocial personality" and thus "the minds of an average jury would not have found the State's case (on the second punishment issue) less persuasive" had witness's testimony been excluded) (internal quotation marks omitted); *Redmon v. State*, 828 P.2d 395, 400 (Nev. 1992) (erroneous admission of "highly unreliable" psychiatric evidence of "future dangerousness" in capitalmurder trial was harmless because record contained "plentiful other evidence from which [the factfinder] could reasonably infer appellant's future dangerousness"), *overruled on other grounds by Alford v. State*, 906 P.2d 714 (Nev. 1995).

(2) The same basic psychiatric evidence of appellant's character for violence was admissible and admitted, without objection, through other, entirely objective, independent medical sources--the reports by Dr. Hodges and the military doctor years before appellant committed these murders;[90]

(3) Dr. Coons's opinion was not particularly powerful, certain, or strong;[91] his opinion, coming after an extremely long and convoluted hypothetical was simply that "there is a probability that" appellant would be a continuing threat to society by committing criminal acts of violence;

(4) Dr. Coons's testimony was effectively rebutted and refuted by Dr. Cunningham, who not only relied upon specifically listed scientific materials and data during his testimony, but

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[90] *See Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).

[91] *Compare Cook v. State*, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991) (given its strength and character, admission of psychiatrist's testimony was harmful error; expert (1) testified that defendant had "an antisocial personality disorder termed sociopath"; (2) opined that defendant "certainly will, from a medical psychiatric standpoint probability, continue to behave and act in a way that does represent a very serious threat to the people within our society"; and (3) concluded that defendant would be an "'extremely severe'" threat to others: "'You can't come any more severe than that. If I had the least doubt, if I had any question in my mind, I certainly would not mind telling you that. I feel absolutely one hundred percent certain that he is and will continue to be a threat no matter where he is.'").

who also noted that Dr. Coons and his methodology had been criticized by both the American and Texas Psychological Associations; and

(5) The State barely mentioned Dr. Coons during closing argument and did not emphasize him or his opinions.

Given these particular circumstances, we conclude that the error in admitting Dr. Coons's testimony did not have a "substantial and injurious" effect upon the jury's deliberations concerning the future dangerousness special issue.[92] We therefore overrule points of error three, four, and five.

The Admissibility of A.P. Merillat's Testimony

In his sixth point of error, appellant claims that the trial court erred in admitting the testimony of A.P. Merillat, an investigator for the Special Prosecution Unit, about the Texas prison classification system and violence in prison. Appellant argues that: (1) Mr. Merillat's testimony

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[92] *See King v. State*, 953 S.W.2d 266, 271-73 (Tex. Crim. App. 1997) (harmless error in erroneous admission of hearsay disciplinary reports; reports "did not have a substantial or injurious influence on the jury's decision" concerning future dangerousness special issue because (1) properly admitted evidence showed an escalating pattern of disregard for the law; (2) the offense itself was particularly brutal; (3) after the murder, the defendant bragged that he would kill again; and (4) the State did not emphasize the documents during closing argument).

was irrelevant as it did not relate to appellant personally, and (2) this witness testified to information that was already common knowledge among jurors. The State argues that Mr. Merillat's rebuttal testimony was relevant to refute Dr. Cunningham's statistical data and to impeach the accuracy of his "low risk" future dangerousness prediction.[93] We agree that Mr. Merillat's testimony was admissible as rebuttal "educator-expert" evidence.

On voir dire, Mr. Merillat stated that his testimony is based on his specialized knowledge of Texas prisons and prison violence during his nineteen years as a criminal investigator with the Special Prosecution Unit. He proposed to testify concerning the underreporting of prison violence in official data compilations, the prison classification system, and the opportunities for violence inside prison.

The trial judge allowed Mr. Merillat's testimony, although he granted appellant's motion in limine to avoid mention of any specific instances of misconduct by other inmates except for one anecdote concerning an inmate's forced starvation death which served as "a great example for underreporting of violence."

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[93] In the trial court, the State noted, "We have all of these statistics that Dr. Cunningham relied upon and we have a right to show that there's a substantial reason to believe that they may be inaccurate."

Mr. Merillat then testified before the jury about the inmate classification system and the under-reporting of violence in prison. He also described administrative segregation and how it is used as "punitive housing" for recalcitrant inmates. Mr. Merillat explained why the official prison statistics used by Dr. Cunningham are not completely reliable: (1) the prison reporting system does not match the penal code definitions of "violent" behavior;[94] and (2) not all incidents of inmate-on-inmate incidents of violence are reported. Finally, he told the jury that, in the last few years, his unit had prosecuted 94 inmates who were serving life sentences for capital murder for both assaultive and non-assaultive felonies.

On cross-examination, Mr. Merillat agreed that he knew nothing about appellant except that his office had never prosecuted him. He agreed that he was not qualified to express any opinion regarding appellant's "future dangerousness." He also explained how death row inmates "had the run of the row" and could work in the garment factory when death row was in the Ellis Unit. Mr. Merillat agreed that the point of his testimony was that there are abundant opportunities for inmates to be either violent or good, depending upon their own decisions.

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[94] For example, Mr. Merillat said that the official TDCJ statistics define serious assaults on staff as only those that result in injuries requiring more than first aid. Thus, while the official prison data showed 78 serious assaults on staff for 2007, the Special Prosecution Unit prosecuted 197 assaults against prison staff members. Similarly, there is no official prison data entry for homicides of prison guards in the line of duty because it is not an inmate death.

Appellant asserts that the primary subject of Mr. Merillat's testimony–opportunities for violence in prison–is within the common knowledge of the jurors. Indeed, most jurors probably have some understanding that violence can and does occur in prison, but a trial court need not exclude expert testimony when the general subject matter is within the comprehension of the average juror, as long as the witness has some specialized knowledge on the topic that will "assist" the jury.[95] It is only when the expert offers no appreciable aid that his testimony fails to meet the Rule 702 standard.[96] The question under Rule 702 is not whether the jurors know something about this subject, but whether the expert can expand their understanding in a relevant way.

In this case, Mr. Merillat confined his testimony to specific information about the operations of the Texas prison system and the

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[95] *See Duckett v. State*, 797 S.W. 2d 906, 914 (Tex. Crim. App. 1990) (under Rule 702, if "specialized knowledge will assist the jury to understand the evidence or will assist them to determine a fact in issue, an expert may be allowed to provide the jury with the benefit of that knowledge. Two themes are prevalent within the language of the rule. First, the jury must not be qualified to intelligently and to the best possible degree determine the particular issue without benefit of the expert witness' specialized knowledge. Second, the clear meaning of the rule must be observed. . . . The use of expert testimony must be limited to situations in which the expert's knowledge and experience on a relevant issue are beyond that of an average juror.") (internal citation omitted).

[96] *See, e.g., Pierce v. State*, 777 S.W.2d 399, 414 (Tex. Crim. App. 1989).

opportunities for violence or productive behavior. His expert testimony was intended to (1) educate the jury about an area in which it lacked a thorough understanding;[97] and (2) cast doubt upon the official prison data that Dr. Cunningham relied upon. Mr. Merillat acted "as an advisor to the jury, much like a consultant might advise a business[.]"[98] Because Mr. Merillat's testimony was educator expertise information designed to "assist" the jury under Rule 702, the trial judge did not abuse his discretion in admitting it. Point of error six is overruled.

In point of error seven, appellant contends that the trial court erred by allowing Mr. Merillat to testify to hearsay information in violation of the Confrontation Clause[99] and of the Texas Rules of

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[97] *See, e.g., Fielder v. State*, 756 S.W.2d 309, 321 (Tex. Crim. App. 1988) (defense expert should have been allowed to testify about why a woman who was physically and sexually abused would continue to stay with an abusive husband because the "average lay person has no basis for understanding the conduct of a woman who endures an abusive relationship"); *see also* FED. R. EVID. 702 advisory committee note ("Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.").

[98] 2 STEPHEN SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 1250 (7th ed. 1998).

[99] Appellant's Confrontation Clause objection is based on his assertion that Mr. Merillat's testimony involved "testimonial hearsay" statements. *See Crawford v. Washington*, 541 U.S. 36, 51 (2004). If the testimony did not involve hearsay, it

Evidence. Out of six instances in which appellant claims that Mr. Merillat testified to hearsay information, we have found only three trial objections based on hearsay or the Confrontation Clause. We will address only those three instances:

(1) Appellant objected on the basis of hearsay to Mr. Merillat's statement that 78 serious staff assaults were documented in the official prison report that Dr. Cunningham had used as the basis for his statistical analysis;

(2) Appellant objected on the basis of hearsay and the Confrontation Clause to Mr. Merillat's explanation of why inmate-on-inmate violence is under-reported – nobody wants to be a "snitch" which is the "very lowest form of life in the penitentiary"; and

(3) Appellant objected on the basis of hearsay and an inability to confront and cross-examine when Mr. Merillat cited the story of an inmate who had been beaten and starved to death by his stronger, gang-member cellmate, as an example of why and when fellow inmates fail to report acts of violence.

The trial judge properly overruled these three hearsay and confrontation objections.

Hearsay is an out-of-court statement by a person offered for the truth of the matter asserted.[100]

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ineluctably follows that it did not involve "testimonial hearsay."

[100] TEX. R. EVID. 801(d).

None of these three pieces of testimony fits that definition. In the first, Mr. Merillat was not offering his statement of the official prison data compilation of "78 serious staff assaults" for the truth of the matter asserted–that there were 78 serious staff assaults in the previous year. Quite the reverse. Mr. Merillat's point was that the official number of 78 was significantly lower than the actual number of serious assaults and thus the official prison statistics that Dr. Cunningham used as the basis for his expert opinion were inaccurate.[101] In the second, the testimony concerning why assaults upon inmates aren't reported "because by telling on the person who did it, they are going to be much worse off[,]" Mr. Merillat did not disclose any out-of-court statement.[102] He was simply explaining, as a general proposition, why inmates do not "snitch" on each other. In the third, the inmate who was beaten and starved to death, appellant does not point to any out-of-court statement. There is none. Mr. Merillat was recounting an event, not a verbal or written statement. He may have first heard of the event by someone telling him of it,[103] but he did not recite or

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[101] *See, e.g., Bell v. State*, 877 S.W.2d 21, 24 (Tex. App.–Dallas 1994, pet. ref'd) ("If the out-of-court statement is relevant only if the trier of fact believes that the statement was both truthful and accurate, then the statement is hearsay. If the relevancy of the statement does not hinge on the truthfulness of the statement, it is not hearsay.").

[102] Appellant's objection would have merit if Mr. Merillat had testified, "Cool Hand Luke told me that he would never be a snitch for Dragline."

[103] Mr. Merillat testified, however, that he investigated this case and "worked the trial of the person responsible" for the

imply any out-of-court statements.[104] Because the trial judge did not abuse his discretion in overruling appellant's hearsay and confrontation objections, we overrule point of error seven.

In his eighth point of error, appellant asserts that Mr. Merillat's testimony was inadmissible because of the Eighth Amendment's "heightened reliability" requirement in capital murder prosecutions. Appellant fails to cite any authority for increasing the admissibility requirements for evidence in a capital murder sentencing trial. Indeed, some state and federal courts have suggested that the Confrontation Clause, the Rules of Evidence, and the rule against hearsay do not apply with full force in capital murder sentencing trials.[105] We express no opinion on that matter, but

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prison death, so he would have first-hand knowledge of at least the events that he briefly described.

[104] When appellant objected that "the gruesome details of how some other individual tortured some other individual has nothing to do with the jury's decision here," presumably invoking Rules 401-403, the trial judge sustained his objection, and the prosecutor moved on.

[105] *See United States v. Fields*, 483 F.3d 313, 332 (5th Cir. 2007) ("Here we are asked to decide whether the confrontation right applies with full force throughout capital sentencing, despite the fact that it is nonexistent at ordinary sentencing. Given that, as shown above, no other Sixth Amendment right has been applied (*vel non*) differently at capital sentencing from how it is applied at noncapital sentencing, there is little reason to establish divergent rules with regard to the confrontation right when the sentencing authority is selecting a sentence from within an authorized range. On the basis of the Supreme Court's consistent treatment of Sixth Amendment rights across capital and noncapital cases alone, we find

we reject appellant's Eighth Amendment claim and therefore overrule point of error eight.

Emotional Outbursts by Two Witnesses

In points of error nine and ten, appellant claims that the trial court erred in denying his motion for a mistrial when Karen Vicha and Lorna Sawyer made separate emotional outbursts during the punishment trial. In each case, the trial judge sustained appellant's objection to the outburst and instructed the jury to disregard the remarks. We conclude that the trial court did not abuse his discretion in these rulings.

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unpersuasive the dissent's textual argument for why the Confrontation Clause should extend through the entirety of the capital sentencing process, in light of the fact that the jury right extends only as far as the eligibility determination."), *cert. denied*, 522 U.S. 1144 (2008); *see also United States v. Johnson*, 378 F. Supp. 2d 1051, 1059-62 (N.D. Iowa 2005) (questioning whether the Confrontation Clause applies in capital sentencing phase); *State v. Johnson*, 284 S.W.3d 561, 583-84 (Mo. 2009) (no abuse of discretion to admit written victim impact statement in capital murder sentencing trial over hearsay and confrontation objections). In *Fields*, the Fifth Circuit explained that in *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976),

> The [Supreme] Court explained that the need for greater reliability in the selection of an appropriate punishment entails *not* stricter evidentiary rules, but the assurance of "individualized sentencing" once a defendant is eligible for the death penalty.

Fields, 483 F.3d at 336.

During Karen Vicha's testimony describing what appellant told her about how he had chased and shot her brother, she explained that

> [Appellant] started talking about–he told me, you're pretty tough, you put up a good fight with that gun. And he said, your brother thought–he said, your brother thought he was tough too. He said, all cops think they're tough, but he thought he was really tough. He said–he said–he told me he said, all I was trying to do was keep you away from my sister. And he said, I finally had to shut him up and blow a hole that big in his neck.

At that point, Karen broke down crying and said, "And I hate you for making me go through this again and my kids. You're mean." The trial judge immediately called a recess.[106] When the jury

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[106] While the jury was out, defense counsel explained what had happened: We would like to note for the record that the last comment of the witness was–was made with the witness in a very tearful state. What the witness did was to turn in her chair, look directly at [appellant] and say something along the lines of, I hate you for making me go through this. That was an unsolicited comment not made in response to any of the Government's questions. So at this time, we would ask the Court to rule that's an inadmissible statement and not relevant and unfairly prejudicial and we would like to ask the Court to instruct the jury to dis– disregard the last remark.

returned, the trial judge instructed them: "Ladies and gentlemen of the jury, at this time I am going to give you an instruction to disregard the last comment of the witness and not consider it for any purpose whatsoever." He denied appellant's motion for mistrial, and the prosecutor continued with his questions.

After six more witnesses had testified, the State called Lorna Sawyer, appellant's cousin. As soon as she had been sworn in, but before any questioning, she burst out, "Evil piece of shit." The defense immediately responded: "Judge we object. Call for a mistrial. Request an instruction to disregard. Call for a mistrial." The Judge said, "I'll instruct the jury to disregard the last comment of the witness," and Ms. Sawyer said, "Sorry." When appellant then requested that she be excluded as a witness, the trial judge took a recess.[107]

The prosecutor agreed that, although it was "spontaneous," and "in response to the emotion of the moment," it would be appropriate to instruct the jury. The defense then asked for a mistrial, based on Rule 403, the Fifth Amendment, Sixth Amendment and the Eighth Amendment.

[107] During the recess, appellant reiterated his objection under Rule 403 and stated, "I think it's completely poisoned the jury, this display of emotion, something that not even the–the complainants–you know, the Vicha family did, I think the jury's going to be unfairly influenced by that to the point that [appellant] now can't get a fair trial." The record reflects that the witness then made a laughing sound. The trial judge said that he would instruct the jury to disregard the comment, and he admonished the witness to answer only the questions that are asked and to "not make any voluntary statements."

When the jury returned, Ms. Sawyer testified that appellant offered her a job at a drive-in theater when she was 16. She had worked there for about two and a half weeks when appellant picked her up for work, but he took her to his house and raped her instead. She was so scared that she had never told anyone, except her sister, about this experience. When the prosecutor asked Ms. Sawyer if she was still afraid of appellant, the following occurred:

Witness: Actually, uh, without being ugly, I'd like to go there and just knock the shit out of him.

Defense: Judge, I'm, going to have to object, Your Honor. I think that was an inappropriate comment.

Witness: It is not inappropriate.

Defense: I'd object to the sidebar from the witness. Judge. I'd ask that–the jury to disregard.

Court: The jury is instructed to disregard the last comment of the witness and not consider it for any purpose.

Defense: I'd ask for a mistrial, You Honor.

Court: That's denied.

State: Lorna–

Witness: I'm sorry, I'm sorry.

And the testimony then continued.

Appellant argues that these outbursts, individually or collectively, unfairly influenced the

jury and that influence could not be limited by an instruction to disregard.

A trial judge's denial of a motion for mistrial is reviewed under an abuse of discretion standard,[108] and his ruling must be upheld if it was within the zone of reasonable disagreement.[109] We have held that an outburst from a bystander or witness "which interferes with the normal proceedings of a trial will not result in reversible error unless the defendant shows that a reasonable probability [exists] that the conduct interfered with the jury's verdict."[110] In the context of such outbursts, the trial judge's instructions to disregard are generally considered sufficient to cure the impropriety because it is presumed that the jury will follow those instructions.[111]

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[108] *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009).

[109] *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009).

[110] *Stahl v. State*, 749 S.W.2d 826, 829 (Tex. Crim. App. 1988) (internal quotation marks omitted) (quoting *Landry v. State*, 706 S.W.2d 105, 112 (Tex. Crim. App. 1985)).

[111] *Gamboa*, 296 S.W.3d at 580; (capital murder defendant not entitled to a mistrial based on an outburst by the victim's family member, shouting "You did this for 200 dollars?", during the testimony of a prosecution witness); *Brown v. State*, 92 S.W.3d 655, 661 (Tex. App.–Dallas 2002) (victim's father's outburst of "Give my son justice, please[,]" during murder trial cured by trial judge's instructions to disregard his comment), *aff'd on other grounds*, 122 S.W.3d 794 (Tex. Crim. App. 2003); *Matthews v. State*, 960 S.W.2d 750, 757 (Tex. App.–Tyler 1997, no pet.) (outburst by manslaughter victim's brother contradicting defense attorney's question about whether the

Appellant relies upon *Stahl v. State*[112] for his claim that the judge's instruction to disregard the spontaneous outbursts could not have cured their prejudicial effect and those outbursts must have interfered with the jury's verdict. But *Stahl* was decided upon the basis of prosecutorial misconduct, not merely the witness's emotional outburst. In *Stahl,* the prosecutor called the victim's mother to the stand, knowing that she was prone to emotional outbursts, and asked her to identify a photograph of her dead son.[113] She burst into tears and yelled, "Oh, my god. My baby. My God. . . . May he rest in hell. May he burn in hell. Oh, my baby."[114] The judge instructed the jury to disregard, but the prosecutor "exacerbated" the impact by repeatedly referring to the incident in closing argument.[115] The prosecutor's "deliberate" and "persistent" conduct, "in direct contravention of prior rulings by the judge" indicated "a desire to impermissibly sway the jury."[116] Indeed, the court of appeals had suggested that the *Stahl* prosecutor "actually orchestrated the original outburst."[117]

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victim's car stereo was on was cured by the judge's instruction to disregard).

[112] 749 S.W.2d 826 (Tex. Crim. App. 1988).

[113] *Id.* at 828.

[114] *Id.* at 828-29.

[115] *Id.* at 830 ("The persistent appeals in the face of adverse rulings speak loudly of the prosecutor's desire to use the outburst for inflammatory purposes.").

[116] *Id.* at 830-31.

[117] *Id.* at 826-27.

In this case, however, there is no suggestion that the prosecutor anticipated the short emotional outburst by Ms. Vicha in the middle of her lengthy testimony or the entirely inappropriate start of Ms. Sawyer's testimony. In the first instance, the prosecutor agreed with the correctness of an instruction to disregard and, in the second, he did not attempt to justify Ms. Sawyer's outburst.[118] The trial judge immediately instructed the jury to disregard those outbursts, and we must presume that the jurors followed these instructions.[119] The prosecution did not refer to, or attempt to capitalize upon, the outbursts during closing arguments. Furthermore, they occurred during the sentencing stage of a capital murder trial, not the guilt stage as in *Stahl*. At the punishment hearing, evidence of the defendant's character is both relevant and admissible as is the opinion testimony concerning good or bad character traits by those who know him.[120] Obviously, character evidence must be offered in a proper form and be responsive to specific questions, so these outbursts were not proper, but their potential for prejudice was less than had they occurred during the guilt phase of a trial.

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[118] Ms. Sawyer could charitably be called a "feisty" witness, and both the prosecutor and defense had difficulty controlling her nonresponsive answers. She was quickly excused.

[119] *See Gamboa*, 296 S.W.3d at 580.

[120] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(a)(1); *see also Martinez v. State*, 924 S.W.2d 693, 696 n.6 (Tex. Crim. App. 1996); *Jones v. State*, 944 S.W.2d 642, 652-53 (Tex. Crim. App. 1996).

Because we conclude that nothing in the record suggests that the outbursts were of such a nature that the jury could not follow the trial judge's instructions to disregard them,[121] we overrule appellant's points of error nine and ten.

The Admission of the Hearsay Statement by a Witness's Sister

In his eleventh point of error, appellant claims that the trial judge erred in admitting Amy Zuniga's testimony that her sister, Karen, told her that appellant was looking in her bedroom window as she was dressing. Appellant objected to hearsay, but the trial judge admitted Amy's testimony as both an excited utterance and a present sense impression. We conclude that the trial judge did not abuse his discretion in finding that Karen's out-of-court statement was admissible as an excited utterance exception to the hearsay rule.[122] Amy Zuniga testified that appellant was her uncle and, when she was young, she thought he was a model of how a parent should be because he was so nice to his own son. However, Amy changed her mind about appellant when she was fifteen. She explained that one day she was sitting in a rocking chair in her nightgown, when appellant came in and pulled her legs apart; then he made "a vulgar display like he was licking me" between her legs. After that, she avoided him. But right before appellant moved into

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[121] *See Gamboa*, 296 S.W.3d at 580.

[122] TEX. R. EVID. 803(2).

Amy's mother's home shortly before the murders, Amy came out of the shower and was changing her clothes in her bedroom when she heard a "commotion from the kitchen, a beating on the window." Then Karen ran through Amy's bedroom door from the kitchen, went outside through her back bedroom door, and started yelling. Amy peeked out through the curtains and saw appellant driving off in his truck. Then Karen came back inside, "very mad and frustrated. She was red, angry." Karen told Amy that she had seen appellant outside looking through the curtains as Amy was dressing.

The trial judge admitted Karen's out-of-court statement to Amy based on it being both an excited utterance and a present sense impression. We need examine its admissibility only under the excited utterance exception. An excited utterance is a statement that relates to a startling event or condition, and it is made when the declarant is still under the stress of excitement caused by the event or condition.[123]

Appellant contends that Karen's statement was not admissible as an excited utterance because there was no showing that she was in the "grip of violent emotion, excitement or pain."[124] She was angry, not excited. The critical question, however, is not the specific type of emotion that the declarant is dominated by–anger, fear, happiness–but whether

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[123] *Id.*; *see McCarty v. State*, 257 S.W.3d 238, 239 (Tex. Crim. App. 2008); *Zuliani v. State*, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003).

[124] *King v. State*, 631 S.W.2d 486, 491 (Tex. Crim. App. 1982).

the declarant was still dominated by the emotion caused by the startling event when she spoke.[125] Appellant also argues that Karen's statement was not admissible because there was no independent evidence of the startling event–appellant's "Peeping Tom" conduct. Appellant cites to a Texas Supreme Court case, *Richardson v. Green*,[126] which applied the common-law "res gestae" rule. But Rule 803(2) changed the common law; the current rule does not require independent evidence of the exciting event before the trial judge may admit the declarant's statements relating to that event.[127] The trial judge

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[125] *Zuliani*, 97 S.W.3d at 596; *see also Apolinar v. State*, 155 S.W.3d 184, 190 (Tex. Crim. App. 2005) (declarant was "animated, angry, and excited" when he made statement about aggravated assault); *see also United States v. Jennings*, 496 F.3d 344, 348-49 (4th Cir. 2007) (statements by 13-year-old airline passenger who was "shocked, angry, and confused" by defendant-passenger's groping of her inner thigh were admissible under FED. R. EVID. 803(2)), *cert. denied*, 552 U.S. 1214 (2008).

[126] 677 S.W.2d 497, 500 (Tex. 1984) ("To be admissible as res gestae a statement must be shown to have been a spontaneous reaction to an exciting event, and there must be independent proof of the occurrence to which the statements relate; the statements themselves cannot be used to prove the exciting event.").

[127] *See* 2 STEVEN GOODE, OLIN GUY WELLBORN, III, & M. MICHAEL SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 803.3, at 132-33 (2d ed. 1993) (stating that Rule 803(2) overturns prior Texas law on the need for independent evidence of the startling event); DAVID A. SCHLUETER & ROBERT R. BARTON, TEXAS RULES OF EVIDENCE MANUAL § 803.02[3][d], at 852-53 (8th ed. 2009); *see also* FED. R. EVID. 803(2), advisory

decides, under Rule 104(a), whether there is sufficient evidence to prove an exciting event, and he may consider the statement itself in making that decision.[128] Here, for example, the trial judge could consider the evidence that Amy said that she (1) heard her sister banging on the kitchen window, (2) saw Karen run through her bedroom and out the door, and (3) saw appellant driving off just before Karen returned to tell her that appellant was peeping in her bedroom window. That evidence, when combined with Karen's statement, would support a finding of the startling event–appellant's "Peeping Tom" conduct.[129]

Because we conclude that the trial court did not abuse his discretion in admitting Karen's excited utterance, we overrule appellant's eleventh point of error.

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committee note; Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 436, at 405-06 (2d ed. 1994).

[128] *See United States v. Moore*, 791 F.2d 566, 570-71 & n.1 (7th Cir. 1986) (stating that the "appearance, behavior and condition of the declarant may establish that a startling event occurred. Further, the declaration itself may establish that a startling event occurred.") (citations omitted); *see also United States v. Brown*, 254 F.3d 454, 459-60 (3d Cir. 2001) (collecting cases and scholarly authority to support its conclusion that "an excited utterance may itself be sufficient to establish that a startling event occurred and that the question whether corroborating evidence independent of the declaration is needed in a given case to establish the occurrence of such an event is committed to the discretion of the trial judge.").

[129] *See Moore*, 791 F.2d at 570-71 & n.1.

Miscellaneous Claims

A. Limitation of Voir Dire Questions

In his twelfth point of error, appellant claims that the trial court erred in limiting his voir dire by refusing to allow him to question the jurors about the mitigation value of specific facts, including evidence of a troubled childhood, mental illness or extreme emotional distress, community service, age, kindness to others, work ethic, or military service. The State objected, citing *Standefer v. State*,[130] *Sells v. State*,[131] and *Wingo v. State*,[132] and stated that these were commitment questions. The trial judge sustained the State's objections, but allowed more general mitigation questions about whether there was anything that the jurors "could consider under the circumstances of having found [appellant] a future danger to society which might merit a life penalty."

In *Raby v. State*, we rejected appellant's claim that he is entitled to ask potential jurors in a death penalty case about what specific evidence that juror could or would consider as mitigating.[133] We stated that "[a] trial court does not abuse its discretion by

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[130] 59 S.W.3d 177, 180 (Tex. Crim. App. 2001).

[131] 121 S.W.3d 748, 755-58 (Tex. Crim. App. 2003).

[132] 189 S.W.3d 270, 270-72 (Tex. Crim. App. 2006).

[133] *Raby v. State*, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998) ("[T]he law does not require a juror to consider any particular piece of evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating.").

refusing to allow a defendant to ask venire members questions based on facts peculiar to the case on trial (e.g. questions about particular mitigating evidence)."[134] Appellant does not persuade us that *Raby* was wrongly decided. We therefore overrule appellant's twelfth point of error.

B. The Mitigation Instruction

In his thirteenth point of error, appellant claims that the trial court erred by refusing to instruct the jurors that they need not unanimously agree on what particular evidence supports an affirmative finding on the mitigation issue. Appellant invokes *Mills v. Maryland*[135] in support of his argument. We addressed and rejected this same argument in *Segundo v. State*,[136] and appellant has not persuaded us that *Segundo* was wrongly decided. We overrule his thirteenth point of error.

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[134] *Id.* (citing *Green v. State*, 912 S.W.2d 189 (Tex. Crim. App. 1995)); *see also Davis v. State*, 313 S.W.3d 317, 346 (Tex. Crim. App. 2010) (following *Raby* and holding that the trial court does not abuse his discretion in finding that appellant's questioning consider specific mitigation evidence was an improper commitment question); *Rosales v. State*, 4 S.W.3d 228, 233 (Tex. Crim. App. 1999) ("This Court has held on numerous occasions that an appellant is not entitled to voir dire prospective jurors on whether they could consider particular types of mitigating evidence during the capital sentencing phase.").

[135] 486 U.S. 367 (1988).

[136] 270 S.W.3d 79, 102-03 (Tex. Crim. App. 2008).

C. The Definition of Mitigating Evidence

In his fourteenth and fifteenth points of error, appellant argues that the trial court should not have given the jury the statutory definition of mitigating evidence "as evidence that a juror might regard as reducing the defendant's moral blameworthiness."[137] This same claim was rejected in *Roberts v. State*,[138] and appellant's arguments do not persuade us to overrule that case. He also contends that the trial judge should have instructed the jury that there need be no nexus between the mitigating evidence and the capital murder because the mandatory statutory definition, he argues, implies that there must be a connection between the reduced moral blameworthiness and the capital offense itself. We do not see any "nexus" requirement in the statutory definition. Appellant relies upon *Tennard v. Dretke*,[139] but the Supreme Court, in that case, simply chastised the Fifth Circuit for *requiring* a nexus between the crime and the mitigating evidence.[140] It never suggested that a jury can, should, or must be instructed not to consider any

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[137] TEX. CODE CRIM. PROC. art. 37.0711, § 3(f)(3) ("The court shall charge the jury that, in answering the issue submitted under Subsection (e) of this section [the mitigation issue], the jury . . . shall consider mitigating evidence that a juror might regard as reducing the defendant's moral blameworthiness.").

[138] 220 S.W.3d 521, 534 (Tex. Crim. App. 2007).

[139] 542 U.S. 274 (2004).

[140] *Id.* at 287 (rejecting any suggestion that its prior opinions would require a nexus between low I.Q. and the crime).

nexus between the crime and the mitigating evidence. Such an instruction would be necessary only if the jury would be reasonably likely to infer a nexus requirement from the statutory words.[141] That is not the case. We overrule appellant's fourteenth and fifteenth points of error.

D. The Mitigation Issue

In his sixteenth point of error, appellant relies on *Apprendi*[142] and *Ring*[143] to argue that Article 37.0711 is unconstitutional because it fails to require the State to prove beyond a reasonable doubt that there are no mitigating circumstances that warrant a life sentence. He fails to mention that this Court has rejected that claim in numerous cases,[144] and he fails to persuade us that our prior decisions were mistaken.

In his eighteenth point of error, appellant claims that the Texas death-penalty scheme is unconstitutional under *Penry II*,[145] because the mitigation issue sends "mixed signals" to the jury, thus rendering any finding reached on that special issue unreliable. *Penry II* is distinguishable because,

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[141] *See Segundo*, 270 S.W.3d at 103.

[142] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[143] *Ring v. Arizona*, 536 U.S. 584 (2002).

[144] *See Segundo*, 270 S.W.3d at 102; *Crutsinger v. State*, 206 S.W.3d 607, 613 (Tex. Crim. App. 2006); *Perry v. State*, 158 S.W.3d 438, 446-48 (Tex. Crim. App. 2004); *Hankins v. State*, 132 S.W.3d 380, 387 (Tex. Crim. App. 2004); *Resendiz v. State*, 112 S.W.3d 541, 550 (Tex. Crim. App. 2003).

[145] 532 U.S. 782 (2001).

in that case, the jury was given a judicially crafted nullification instruction.[146] Here, the jury was given the statutorily mandated mitigation question, which does not contain a nullification instruction. No error exists, and we have repeatedly rejected this claim.[147] We overrule appellant's eighteenth point of error.

E. Constitutional Challenges to Art. 37.0711

In his seventeenth point of error, appellant contends that the Texas death-penalty statute gives the jury too much discretion and therefore permits arbitrary and inconsistent application of the ultimate penalty. We have repeatedly rejected this claim and appellant does not persuade us to overrule these prior cases.[148] In fact, he fails to mention them.

In his nineteenth and twentieth point of error, appellant argues that the jurors should have been instructed on the consequences of a hung jury so that they would immediately stop deliberating if a single juror voted in appellant's favor on an issue that required unanimity. He also argues that the

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[146] *Id.* at 797-99.

[147] *See, e.g., Saldano v. State*, 232 S.W.3d 77, 107 (Tex. Crim. App. 2007); *Scheanette v. State*, 144 S.W.3d 503, 506 (Tex. Crim. App. 2004); *Jones v. State*, 119 S.W.3d 766, 790 (Tex. Crim. App. 2003).

[148] *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex. Crim. App. 2004); *Turner v. State*, 87 S.W.3d 111, 118 (Tex. Crim. App. 2002); *Shannon v. State*, 942 S.W.2d 591, 600 (Tex. Crim. App. 1996); *Bell v. State*, 938 S.W.2d 35, 53-54 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995).

jurors should not have been instructed on the "10-12" Rule. Although appellant fails to mention controlling precedent from this Court, we have repeatedly rejected these claims.[149] We do so again.

In his twenty-first through twenty-third points of error, appellant argues that the statutory "future dangerousness" special issue is unconstitutional because the terms "probability," "criminal acts of violence," and "society" are not defined. We have repeatedly rejected these claims,[150] and, although counsel suggests that we should revisit this precedent, we decline to do so.

In his twenty-fourth point of error, appellant contends that the statutory "future dangerousness" special issue violates the Eighth Amendment because no one can reliably predict whether another person will commit acts of violence in the future and therefore this is an arbitrary factor. The "future dangerousness" aggravating factor has been recognized by the Supreme Court as properly narrowing the jury's consideration to ensure

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[149] *See, e.g., Resendiz v. State*, 112 S.W.3d 541, 548-49 (Tex. Crim. App. 2003); *Johnson v. State*, 68 S.W.3d 644, 656 (Tex. Crim. App. 2002); *Wright v. State*, 28 S.W.3d 526, 537 (Tex. Crim. App. 2000); *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999); *McFarland v. State*, 928 S.W.2d 482, 519 (Tex. Crim. App. 1996).

[150] *See, e.g., Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007); *Blue v. State*, 125 S.W.3d 491, 504-05 (Tex. Crim. App. 2003); *Martinez v. State*, 924 S.W.2d 693, 698 (Tex. Crim. App. 1996); *Earhart v. State*, 877 S.W.2d 759, 767 (Tex. Crim. App. 1994).

individualized sentencing as recently as two years ago in *Kennedy v. Louisiana*.[151] Although appellant asserts that only one other state, Oregon, requires a finding of future dangerousness in his effort to prove that a "national consensus" has developed against imposing the death penalty based on that factor, he fails to note that twenty-one other states include a defendant's possible future dangerousness among the aggravating circumstances to be considered at the sentencing stage of a capital case.[152] Furthermore, we have previously rejected this claim,[153] and we are not persuaded by appellant's arguments that our precedent should be overruled.

In his final point of error, appellant claims that the "future dangerousness" statutory scheme violates the Texas constitutional ban on cruel or

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[151] 128 S.Ct. 2641, 2661 (2008) ("The [Supreme] Court . . . has upheld the constitutionality of aggravating factors ranging from whether the defendant was a 'cold-blooded, pitiless slayer,' to whether the 'perpetrator inflict[ed] mental anguish or physical abuse before the victim's death,' to whether the defendant 'would commit criminal acts of violence that would constitute a continuing threat to society.'") (internal citations omitted; some internal quotation marks omitted).

[152] Jonathan R. Sorenson & Rocky L. Pilgrim, *Criminology: An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. & Criminology 1251, 1252 (2000) ("The goal of incapacitating dangerous offenders prompted twenty-one states to include a defendant's potential for future violence among the aggravating circumstances jurors may be directed to consider before reaching a punishment decision.").

[153] *See, e.g., McBride v. State*, 862 S.W.2d 600, 611 (Tex. Crim. App. 1993); *Joiner v.State*, 825 S.W.2d 701, 709 (Tex. Crim. App.1992).

unusual punishment. As appellant acknowledges, we have already rejected this argument.[154] Appellant asserts that we now have before us his "evidence" that the "future dangerousness inquiry results in inaccurate, unreliable, arbitrary and disproportionate determinations." His evidence is the citation to an article written by the Texas Defender Service,[155] an advocacy group that represents inmates on death row. This is not the type of "evidence" upon which we can base a finding that the "future dangerousness" special issue is necessarily an unreliable factor to use in determining whether a life or death sentence is appropriate. Evidence proves historical facts; the "future dangerousness" special issue is a normative assessment mandated by the legislature and determined by the jury. Questions about its "appropriateness" as a factor in determining a life or death sentence should be addressed to the legislature. Furthermore, the article speaks of psychiatric predictions, not of the unreliability of jury verdicts. We overrule appellant's twenty-fifth point of error. Having found no reversible error, we affirm the trial court's judgment and sentence. Delivered: October 13, 2010

Publish

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[154] *See Anderson v. State*, 932 S.W.154 2d 502, 509-10 (Tex. Crim. App. 1996); *see also Cantu v. State*, 939 S.W.2d 627, 639 (Tex. Crim. App. 1997).

[155] Texas Defender Service, Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness, 47-48 (2004).

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

January 12, 2011
Re: Case No. AP-76,019
STYLE: COBLE, BILLIE WAYNE

On this day, the Appellant's motion for rehearing has been denied.

Louise Pearson, Clerk

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Sup Court U.S.
MAY 18 2011
OFFICE OF THE CLERK

No. 10-1271

In The
Supreme Court of the United States

BILLY WAYNE COBLE,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED – RESTATED

The questions presented as restated by Respondent are:

1. Did the Texas Court of Criminal Appeals correctly apply this Court's holding in *Barefoot v. Estelle* that a challenge to the entire field of expert testimony on future dangerousness had been rejected or does the Eighth Amendment require state courts to apply some other standard of review than those found in their normal rules of evidence and procedure for erroneously admitted expert testimony in a capital case?

2. Does the Texas future dangerousness scheme on capital sentencing, as approved by *Jurek v. Texas*, violate the Eighth Amendment by having jurors consider an individual's character for violence?

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INTRODUCTION

Petitioner, Billy Wayne Coble, abused his third wife, Karen Vicha, both physically and verbally, before she decided to leave him. After hearing the news, Petitioner made threats, kidnapped Karen at knifepoint before releasing her, and murdered her dog before turning his rage towards her family. On August 29, 1989, Petitioner murdered Karen's mother, father, and her brother before kidnapping and attempting to murder her.

PROCEDURAL HISTORY

Petitioner was sentenced to death by a jury in 1990. The Texas Court of Criminal Appeals affirmed. This Court denied the petition for certiorari. The Fifth Circuit Court of Appeals granted habeas relief in 2007. Petitioner was retried on punishment only in 2008. The jury sentenced him to death. The Court of Criminal Appeals affirmed. Petitioner filed an Application for Habeas relief from the Court of Criminal Appeals, which is currently pending, and now this Petition for Writ of Certiorari.

In affirming the 2008 sentence of death, the Court of Criminal Appeals found that the State had not met its burden under the Texas Rules of Evidence and *Kelly v. State* to support admission of the testimony of its future danger expert, Dr. Coons. However, the court found such error to be harmless in light of all the other punishment evidence presented and the

nature of Dr. Coons's "common sense" opinions. The standard of review for such evidence in Texas is the same as any other erroneously introduced evidence under Rule 44.2 of the Texas Rules of Appellate Procedure.

FACTS OF THE CRIME

Petitioner was upset that Karen Vicha had reported an incident to police, where he kidnapped her at knife-point, and had him arrested. After Petitioner was released from jail, he went to confront Karen and waited at her house for her to return home from work. Some of the Vicha children came home first, so he bound and gagged them. Growing impatient and worried that he would be discovered, Petitioner went to the other Vicha residences[1] and killed Karen's mother, father, and brother, a Waco Police Officer, with multiple gunshots. He shot each victim in the head at least once. When Karen Vicha arrived home, she found Petitioner waiting for her with the children bound on the floor. He taunted Karen, telling her how he killed her brother, father, and mother and that there was no one left to help her. Concerned for the children, Karen was able to convince Petitioner to leave with her.

[1] The extended Vicha family lived in residences in close proximity on the same street in the town of Axtell, Texas.

Petitioner told Karen he was going to kidnap her and torture her for a few weeks. After they were in the car, he proceeded to pistol whip her until there was so much blood in her eyes that she could not see. He stopped in a field where he threatened to rape her. While they were in the car, he continuously alternated putting his hand between her thighs and holding a knife to her throat. He also used the knife to cut her face. The kidnapping ended only when local authorities gave chase and Petitioner crashed the vehicle he and Karen were in—an attempt at a murder-suicide.

Petitioner was convicted of murder for the deaths of Bobby Vicha, Robert Vicha, Sr., and Zelda Vicha. He was also charged with, but never prosecuted for, the kidnapping and attempted murder of his wife, Karen Vicha.

During the punishment phase of both trials, jurors heard evidence that Petitioner had physically abused Karen and his two previous wives. They also heard about his molestation of several young girls. Prosecutors introduced a mental evaluation performed when Petitioner was a teenager, which showed a total lack of respect for women with an exhibition of sociopathic tendencies. That evaluation turned out to be prophetic.

STATEMENT OF THE CASE

Petitioner asks this Court to review a case that was decided on state-law grounds and in accordance with this Court's holding in *Barefoot v. Estelle*. The Texas Court of Criminal Appeals held that the trial court erred in allowing the testimony of Dr. Coons, the State's expert on future dangerousness, because the State did not carry its burden to qualify him as an expert. Recognizing the error, the Court of Criminal Appeals applied the harm analysis found in Texas Rule of Appellate Procedure 44.2(b) and found the error harmless. The court further held that *Barefoot* forecloses an Eighth Amendment challenge to the field of expert testimony on future dangerousness as a whole.

The standard set forth in *Barefoot* does not require any special or heightened level of review for erroneously admitted evidence, expert or otherwise. Given the opportunity in other cases, this Court has repeatedly refused to create different standards for the admission of evidence for the State in capital cases on Eighth Amendment grounds and should not do so now.

Second, there is no evidence that the future dangerousness framework approved in *Jurek v. Texas* has changed or that it was misapplied in this case. This Court has consistently held that the jury should consider the character of a defendant when making their determination of punishment and deciding issues of mitigation. Petitioner also claims Texas

somehow bound itself to applying the future dangerousness inquiry without considering a defendant's character for violence, however the *Jurek* decision never referenced this argument from the State's brief and did not rely upon it in the opinion.

SUMMARY OF ARGUMENT

Rather than alleging a violation of existing law or precedent, Petitioner asks this Court to adopt the dissenting view from *Barefoot v. Estelle*. This minority view advocates that the Eighth Amendment requires some vague and unidentified heightened-reliability requirement for expert testimony in capital-sentencing proceedings. However, the majority opinion from *Barefoot* expressly states that there is no constitutional barrier to applying the normal rules of evidence in admitting or excluding expert testimony. More recent cases from this Court have reached the same conclusion. After conducting a harm analysis under this standard, the Texas Court of Criminal Appeals found the erroneous admission of expert testimony to be harmless. Petitioner asks this court to adopt a per-se harm rule for erroneously admitted expert testimony because he cannot establish harm in this case without it.

Second, Petitioner misinterprets *Jurek* as requiring the State to prove some future specific act of violence rather than show an accused's violent character through past crimes or the nature of the crime

for which he is currently on trial. Nothing in *Jurek* supports Petitioner's position that this character evaluation must be performed "in reality, not in the abstract." In fact, *Jurek* notes with approval that courts and juries around the country routinely make predictions about future dangerousness based upon a defendant's character when making decisions about probation, bail, etc. Character is an essential consideration, both in determining mitigation and future dangerousness.

Because the decision of the Texas Court of Criminal Appeals was resolved on state-law grounds and in accordance with the precedents of this Court, further review is not warranted.

REASONS FOR DENYING THE PETITION

I. THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY APPLIED THIS COURT'S PRECEDENT FROM *BAREFOOT*.

Petitioner argues that whatever the accepted standard for the reliability of expert testimony in most criminal cases, the Eighth Amendment demands special evidentiary rules and a higher standard of review for error in a capital case. This is not the law and Petitioner's arguments to the contrary are unsupported by this Court's prior decisions.

A. The CCA[2] correctly interpreted *Barefoot* as foreclosing any argument that expert testimony on future dangerousness fails to meet the heightened reliability requirement of the Eighth Amendment.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), this Court relied upon three essential holdings that are relevant to this case:

1. There is nothing inherent in the field of expert forensic psychology that prohibits the entire field from testifying on the special issue of future dangerousness in a capital case. *Id.* at 896-897, 889-901.

2. The standard use of hypothetical questions is acceptable when questioning such experts. *Id.* at 903.

3. There is no constitutional barrier to applying ordinary rules of evidence governing the use of expert testimony in cases involving the death penalty. *Id.* at 904-905.

The CCA agreed with Petitioner that Dr. Coons's testimony should not have been admitted. However, the admission was found to be harmless. The erroneous admission of irrelevant or prejudicial evidence, even in a capital case, does not automatically require

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[2] For the sake of readability, the Texas Court of Criminal Appeals will be referred to as the CCA throughout the Argument section.

reversal. "That the evidence may have been irrelevant as a matter of state law, however, does not render its admission federal constitutional error." *Romano v. Oklahoma*, 512 U.S. 1, 11 (1994), *citing Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Courts are required only to apply their regular rules of evidence.

In his direct appeal, Petitioner contended that the whole of expert testimony regarding future dangerousness violates the Eighth Amendment and should be categorically excluded. The CCA summarily denied Petitioner's Eighth Amendment claim because this Court had already rejected it in *Barefoot*. By summarily dismissing this global challenge, the CCA neither expanded this Court's holding in *Barefoot*, nor dismissed the specific constitutional challenge to the testimony of Dr. Coons in this case. The court performed a lengthy harm analysis under Texas Rule of Appellate Procedure 44.2(b) for the erroneous admission of evidence, just as directed by this Court in *Barefoot*. That analysis looks at whether Petitioner's substantial rights were affected by the error and mandates reversal if there was any harm. Thus the CCA evaluated both of Petitioner's arguments, including his objection to expert testimony on future dangerousness as a whole and the erroneous admission of Dr. Coons's testimony specifically in this case.

B. The CCA correctly applied the Texas Rules of Evidence and the Texas Rules of Appellate Procedure in determining that the admission of Dr. Coons's testimony was harmless and did not affect his substantial rights.

The standard for reviewing evidentiary error in Texas safeguards against constitutional violations. Because the Texas Rules of Appellate Procedure require the appellate courts to consider whether a defendant's substantial rights have been violated, the possibility of a constitutional violation is always considered. In Texas, evidentiary errors in criminal cases are reviewed under Texas Rule of Appellate Procedure 44.2. Any error not affecting substantial rights is to be disregarded. TEX. R. APP. P. 44.2(b).[3] The CCA has adopted the test set forth in *Kotteakos v. United States*, 328 U.S. 750 (1946) as the standard for determining when substantial rights have been violated and reversal warranted. *Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005).[4] Therefore, in its analysis of the harm from the wrongfully admitted evidence, the rule requires the CCA to consider whether the admission of the evidence violated Petitioner's substantial rights. If Constitutional rights

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[3] The Texas rule is almost identical to the federal standard. *See* 28 U S C. § 2111, *Chapman v California*, 386 U.S. 18, 22-24 (1967).

[4] "A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Haley*, 173 S W.3d at 518.

are violated, then Rule 44.2(a) applies and the State must prove the error harmless beyond a reasonable doubt.

State courts are not required to apply anything more than the regular rules governing the admission of evidence in capital punishment trials. "[T]he States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished. This latitude extends to evidentiary rules at sentencing proceedings." *Romano*, 512 U.S. at 7. *Barefoot* establishes the standard for whether the admission of unreliable expert testimony in a particular case violates the Constitution: the regular rules of evidence. *See Barefoot*, supra. This is exactly what the CCA did.

Petitioner argues that the CCA's opinion means that wrongful admission of expert testimony would never result in an Eighth Amendment violation. While the Eighth Amendment provides some limitations on capital sentencing, it is not a universal ground of review for any evidentiary error which may have occurred during trial. States are free to apply their own rules of evidence and appellate review to evidentiary errors. These rules and statutes provide sufficient protection and this Court has refused to create a new federal standard under the Eighth Amendment to supersede them.

C. There is no special or heightened level of review for the erroneous admission of evidence in capital cases, expert or otherwise.

Next, Petitioner urges that Eighth Amendment jurisprudence requires some enhanced level of review for the erroneous admission of evidence. Respondent can locate no such requirement. In fact, this Court has stated explicitly that the Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. *Romano v. Oklahoma*, 512 U.S. at 11-12, *citing Payne v. Tennessee*, 501 U.S. 808, 824-825 (1991).

Petitioner's argument merely repeats a minority opinion. Justices Brennan and Marshall joined Justice Blackmun's *Barefoot* dissent and advocated for a requirement of greater reliability of evidence in capital cases, but that dissent is not the law. *Barefoot*, 463 U.S. at 924-929. In *Barefoot* and *Romano*, the majority held that there is no constitutional barrier to applying the normal rules of evidence in a capital case. *Barefoot*, 463 U.S. at 904-905; *Romano*, 512 U.S. at 11-12. Therefore, it was proper for the CCA to conduct its harmless error review under the regular rules for erroneously admitted evidence. That Petitioner disagrees with the result is not a ground for review in this Court.

This Court's Eighth Amendment jurisprudence regarding the death penalty has focused on ensuring fair procedure.

> "In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." *California v. Ramos*, 463 U.S. 992, 999 (1983) (emphasis in original) (referring to the wholesale review of the capital punishment schemes used by several states).

In an effort to ensure fairness, this Court has consistently lowered the evidentiary threshold for defendants to admit mitigating evidence. State capital sentencing laws and instructions to jurors must ensure that jurors consider this mitigating evidence.

Petitioner asks this court to fashion general evidentiary rules, which would govern the admissibility of evidence at capital sentencing proceedings, under the guise of interpreting the Eighth Amendment. This Court has declined this invitation in the past and should decline to hear this case as well. *See Payne*, 501 U.S. at 824-825. Creating such rules would undermine longstanding principles of federalism and our constitutional system, where each State maintains sovereign authority to prescribe the specific manner in which it will try and punish those that violate state law. This Court has a lengthy history of granting the States wide "latitude to prescribe the method by which those who commit murder shall be

punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

Petitioner's argument also relies upon the false assumption that the Eighth Amendment is a defendant's only protection from unreliable expert testimony. Both the Texas and Federal Rules of Evidence have specific provisions governing the admission of expert testimony and both jurisdictions have extensive case law governing the admission of expert testimony. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992); *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998). State and Federal law also provide the standards of review for evidentiary errors, including those of constitutional magnitude. These laws sufficiently protect defendants' rights.

D. The authorities relied upon by Petitioner are all distinguishable from this case.

First, Petitioner's reliance on *Johnson v. Mississippi*, 486 U.S. 578 (1988), is misplaced. The Court emphasized in *Johnson* that decisions in capital cases cannot be predicated on mere 'caprice' or on factors that are constitutionally impermissible or totally irrelevant to the sentencing process. *Id.* at 584-585. There, the only evidence supporting an aggravating factor necessary to impose the death penalty turned out to be invalid—a prior murder conviction that was overturned on appeal. The evidentiary error only violated the Eighth Amendment because it

invalidated the aggravating factor. *Johnson* does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence. *Romano*, 512 U.S. at 11. In *Romano*, this Court rejected an argument identical to Petitioner's, holding that even improper admission of a prior sentence of death could be rendered harmless evidentiary error. *See id.*

Second, the case of *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is distinguishable in the Eighth Amendment context because the prosecutor unambiguously and strongly misled the jury to believe that the responsibility for sentencing the defendant to death was not in their hands. *Id.* at 340. The jury must not be misled regarding the role it plays in the sentencing decision. *Id.* at 336. Such remarks by the prosecutor impermissibly minimized the jury's sense of responsibility for determining the appropriateness of death. *Id.* at 341. There was no prosecutorial misconduct in the instant case.

Finally, Petitioner relies on *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) to argue that evidence in a capital case should be scrutinized with heightened reliability and accuracy. However, the ruling in *Guzek* dealt with a defendant's argument that he had an Eighth Amendment right to present evidence casting residual doubt on the finding of guilt during the punishment phase of his capital trial. Rejecting that argument, this Court held that the States retain authority to set reasonable limits upon the mitigation evidence a defendant can submit, and to control the

manner in which it is submitted in an effort to achieve a more rational and equitable administration of the death penalty. *Id.* at 526. That case presented a different question and provides no support for Petitioner's argument.

In conclusion, this Court should deny the petition because the CCA resolved the evidentiary issue on state-law grounds and in accordance with this Court's precedents. The CCA did not extend the holding in *Barefoot*; it was applied correctly. Petitioner's arguments to adopt dissenting opinions and fundamentally alter this Court's Eighth Amendment jurisprudence show that there are no grounds for this Court to review this case.

II. THE FUTURE DANGEROUSNESS FRAMEWORK ENACTED BY TEXAS TO DETERMINE CAPITAL SENTENCING IS CONSTITUTIONAL.

There is nothing new, hypothetical, or conjectural about the State's future dangerousness test as it was applied to Petitioner. In *Jurek*, this Court considered the future-dangerousness special issue and approved of its use in Texas' capital sentencing scheme. *Jurek*, 428 U.S. at 273-274. For a jury to make an affirmative finding on future dangerousness, the only requirement is that there must be a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. TEX. CODE CRIM. PROC. art. 37.0711 Sec. 3(b)(2). Nothing

in *Jurek* or Texas law limits application of the special issue to mere incapacitation by incarceration.

Petitioner argues that "incapacitation addresses danger in reality, not in the abstract." Pet. Br. at 30. The future dangerousness test is not merely about incapacitation by incarceration. This Court has never limited the application of Texas' future dangerousness special issue in that way. Instead, jurors are called upon to assess defendant's present character for future dangerousness and are allowed to consider the entirety of the evidence before them when coming to their conclusion, including the prison environment where they are incarcerated. There is no reason now to revisit that issue when the test—which has not changed in its wording or application—comports with this Court's capital sentencing jurisprudence.

Petitioner also ignores the reality that he was eligible for parole at the time of his retrial on punishment. At the time Petitioner committed his offense, the sentencing options were death or life with the possibility of parole. Act of May 25, 1987, 70th Leg., R.S., ch. 385, § 5, 1987 Tex. Gen. Laws 1887, 1889. Life without the possibility of parole was not an available sentencing option for capital murder in Texas until 2005. TEX. PENAL CODE ANN. § 12.31 (Vernon Supp. 2010), *codifying* Act of May 28, 2005, 79th Leg., R.S , ch. 787, § 1, 2005 Tex. Gen. Laws 2705, 2705. At the time the offense was committed, an inmate serving a life sentence was parole-eligible after serving 15 years of a life sentence, and a 'full' life sentence was 60 years. Act of May 25, 1987, 70th

Leg., R.S., ch. 385, § 5, 1987 Tex. Gen. Laws 1887, 1889. Therefore, there was nothing abstract about a determination of future dangerousness where a life sentence could have resulted in Petitioner's near-immediate release from prison if given a life sentence.

Additionally, a defendant's character for violence is an appropriate consideration when deciding if there is a probability that an individual will commit future acts of violence. This Court has consistently held that the character of a defendant must be considered by the jury when assessing the death penalty. "States must ensure that capital sentencing decisions rest on [an] individualized inquiry, under which the character and record of the individual offender and the circumstances of the particular offense are considered." *Romano*, 512 U.S. at 7, *citing McCleskey v. Kemp*, 481 U.S. 279, 303 (1987). Character is frequently used in criminal cases and this Court has often referred to it as a necessary consideration in capital sentencing. The defendant's character, prior criminal history, mental capacity, background, and age are just a few of the many factors, in addition to future dangerousness, that a jury may consider in fixing appropriate punishment. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Barclay v. Florida*, 463 U.S. 939, 948-951 (1983). Such determinations are routine.

Petitioner also suggests that his good conduct in prison is determinative of the issue of future dangerousness. However, the jury is not required to focus on any one fact or piece of evidence presented, like

behavior in jail. The CCA has approved a non-exclusive list of factors a jury may consider when determining future dangerousness:

(1) the circumstances of the capital offense, including the defendant's state of mind and whether he was acting alone or with other parties;

(2) the calculated nature of the defendant's acts;

(3) the forethought and deliberateness exhibited by the crime's execution;

(4) the existence of a prior criminal record and the severity of the prior crimes;

(5) the defendant's age and personal circumstances at the time of the offense;

(6) whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;

(7) psychiatric evidence; and

(8) character evidence.

Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987). In the appropriate case, the circumstances of the offense alone may warrant an affirmative answer to the future dangerousness special issue. *Sonnier v. State*, 913 S.W.2d 511, 517 (Tex. Crim. App. 1995).

The jurors deciding Petitioner's retrial on punishment were certainly allowed to question his motives

for his allegedly good behavior in prison. Death row prisoners with appeals pending have a strong incentive to behave. Their very life may depend upon it. Jurors were also allowed to consider the possibility of Petitioner's release from his life sentence or that given a life sentence he would commit acts of violence in prison once all his appeals were exhausted. There is no error in using a long history of violence towards others, even given a period of seemingly peaceful behavior, in deciding that an individual poses a future danger.

Petitioner also misquotes and misinterprets *Gregg v. Georgia*, 428 U.S. 153 (1976). Pet. Br. at 34. When laying out the requirements for a capital sentencing scheme, the full quotation is as follows:

> "In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.* at 195.

When the Court was speaking of "information and guidance," it was referencing the requirement that state law must allow for mitigation evidence to be

presented and that the law must ensure that jurors consider such information, not "specific and detailed guidance" on how jurors are to determine if a defendant is a future danger. Petitioner errs by commingling Court's aggravating factor jurisprudence with those cases that require a jury to consider mitigating evidence when assessing the death penalty.

The Texas capital sentencing scheme complies with *Gregg* by separating out aggravation, future dangerousness, and the consideration of mitigation evidence. In Texas, the aggravating factors are limited in number and specifically detailed by statute. TEX. PENAL CODE ANN. § 19.03 (Vernon 2003). The aggravating factor is found by the jury's verdict of guilt. The future dangerousness special issue, decided during punishment, is the vehicle by which Texas juries consider mitigation evidence. *Jurek v. State*, 522 S.W.2d 934, 939-940 (1975). However, in response to the *Penry* line of cases from this Court, Texas added an additional question during punishment which asks the jury to consider all of the evidence and decide if there is a sufficient mitigating circumstance to warrant life imprisonment instead of death.[6] *See* TEX. CODE CRIM. PROC. art. 37.0711 Sec. 3(e); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001).

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[6] Petitioner was granted habeas relief because the special issues submitted to the jury during the punishment phase of his trial were not in accord with the holdings from *Penry I* and *Penry II*. *See Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007).

This case is not an ideal vehicle for considering Texas' death penalty scheme because Texas Code of Criminal Procedure article 37.0711 has been modified since the decision in *Jurek* to include a special question solely on mitigation. The law directs jurors to consider, among other things, the defendant's character and background. Now, defendants have the added protection of a specific question on mitigation and a more direct question to jurors about which sentence they wish to impose, offering instead the option of life without parole, which was not an option at the time Petitioner murdered the victims in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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BILLIE WAYNE COBLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR AMICI CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION AND TEXAS PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR AMICI CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION AND TEXAS PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE[1]

The American Psychological Association ("APA"), a voluntary nonprofit scientific and professional organization with approximately 155,000 members and affili-

[1] Counsel of record for both parties received timely notice of the intent to file this brief and letters consenting to the filing have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

ates, is the leading association of psychologists in the United States. Among APA's major purposes are to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns.

The Texas Psychological Association ("TPA"), a state affiliate of APA, has 1,500 members. Among TPA's major purposes are to advance psychology as a science, profession, and a means of promoting human welfare by, among other things, the diffusion of psychological knowledge.

The issue at the heart of this case—the reliability of mental-health expert testimony on an individual's risk of "future dangerousness"—has been the subject of significant research. Amici submit this brief to present scientific knowledge that provides a context for this Court's consideration of whether admitting unreliable expert testimony in a particular capital sentencing proceeding can constitute constitutional error. Amici support the grant of a writ of certiorari because the integrity of the legal system and the mental health profession are undermined if unscientific, unreliable, but purportedly expert testimony about future dangerousness is deemed constitutionally admissible in capital sentencing.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

This Court has repeatedly held that the "Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'" *Oregon* v. *Guzek*, 546 U.S. 517, 525 (2006). Here, the Texas Court of Criminal Appeals ("TCCA") held that Dr. Richard Coons's expert testimony about petitioner Billie Wayne Coble's future dangerousness was "insufficiently reliable" under Texas evidentiary rules. Pet. App. 21a-22a; *id.* 38a-44a (applying reliability principles similar to those set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)). Despite that conclusion and this Court's other Eighth Amendment guidance, the TCCA relied on *Barefoot* v. *Estelle*, 463 U.S. 880 (1983), for the proposition that admitting purported expert testimony that is patently unscientific, not expert, and not reliable—even if a capital sentencing jury considered and was persuaded by it—can never be constitutional error. Even where (as here) state evidentiary rules would exclude such testimony, the Texas court's understanding of the federal Constitution would permit a defendant to be executed where there has been no showing beyond a reasonable doubt that the erroneous admission of such testimony did not contribute to the verdict of death.

The Eighth Amendment, however, mandates heightened reliability in the determination that death is the appropriate punishment. *Guzek*, 546 U.S. at 525;

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[2] Amici acknowledge and thank the following scientists and APA members for their assistance: Mary Alice Conroy, Ph.D., David DeMatteo, J.D., Ph.D., Joel A. Dvoskin, Ph.D., Laura S. Guy, Ph.D., Kirk Heilbrun, Ph.D., and Daniel A. Krauss, J.D., Ph.D.

see also Woodson v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality op.). "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,'" this Court has repeatedly "invalidated procedural rules that tended to diminish the reliability of the sentencing determination." *Beck* v. *Alabama*, 447 U.S. 625, 638 (1980). In particular, this Court has recognized that "accurate sentencing information is an indispensible prerequisite" to ensuring such constitutionally mandated reliability. *Gregg* v. *Georgia*, 428 U.S. 153, 190 (1976).

This Court should grant certiorari to decide whether the Eighth Amendment requires that purportedly expert testimony on a capital defendant's future dangerousness demonstrates some degree of reliability.

Significant scientific evidence exists regarding mental-health professionals' ability to assess whether an individual will commit future acts of violence. Studies have long established that unstructured clinical assessments like Dr. Coons's are not grounded in scientific principles and are less reliable than structured risk-assessment approaches. These more reliable methods, such as actuarial approaches, structured professional judgment, and anamnestic approaches, have sound scientific footing and have been used to assess future dangerousness in other contexts. Studies demonstrate that these structured scientific methods have reasonable predictive validity in appropriate cases, and similar instruments designed to assess the risk of violence in prison are in development.

The admission of unreliable, unstructured clinical expert testimony on future dangerousness may adversely affect many states' capital-sentencing schemes.

Two states require juries to find "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before imposing the death sentence. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(1); Or. Rev. Stat. §163.150(1)(b)(B). Future dangerousness is a statutory aggravating factor in capital cases in four states[3] and a non-statutory aggravating factor in twelve states and the federal system.[4] Three states in which future dangerousness plays a role in capital sentencing account for over half of all executions since 1976.[5]

Holding that the Eighth Amendment bars admission of *unreliable* expert testimony (as opposed to *any* expert testimony) would not require this Court to revisit *Barefoot*'s rule against the categorical exclusion of

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[3] Idaho Code Ann. § 19-2515(9)(i); Okla. Stat. tit. 21, § 701.12(7); Va. Code Ann. § 19.2-264.2(1); Wyo. Stat. Ann. § 6-2-102(h)(xi).

[4] *See* 18 U.S.C. § 3592(b) ("The jury ... may consider whether any other aggravating factor for which notice has been given exists."); *Arthur* v. *State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990); *People* v. *Smithey*, 978 P.2d 1171, 1217 (Cal. 1999); *Walker* v. *State*, 327 S.E.2d 475, 484 (Ga. 1985); *State* v. *Welcome*, 458 So. 2d 1235, 1256 (La. 1983); *State* v. *Deck*, 303 S.W.3d 527, 543-544 (Mo. 2010); *State* v. *Smith*, 705 P.2d 1087, 1103-1105 (Mont. 1985); *Redmen* v. *State*, 828 P.2d 395, 400 (Nev. 1992), *overruled on other grounds by Alford* v. *State*, 906 P.2d 714 (Nev. 1995); *State* v. *Steen*, 536 S.E.2d 1, 30-31 (N.C. 2000); *State* v. *Bouke*, 526 N.E 2d 274, 280 (Ohio 1988); *Commonwealth* v. *Trivigno*, 750 A.2d 243, 253-254 (Pa. 2000); *State* v. *Young*, 459 S.E.2d 84, 87 (S.C. 1995); *State* v. *Arguelles*, 63 P.3d 731, 759 (Utah 2003).

[5] The States are Texas, Virginia, and Oklahoma. *See* Death Penalty Information Center, *Facts About the Death Penalty*, http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (updated May 9, 2011).

expert testimony on future dangerousness. Moreover, two significant developments since *Barefoot* support a grant of certiorari. First, scientific methods have evolved, alleviating this Court's concern in *Barefoot*, 463 U.S. at 898, about the availability of expert testimony regarding future behavior in other contexts. As noted above, structured risk-assessment methods are used to assess future dangerousness in other contexts, including civil commitments and parole determinations. These methods are grounded in science and are more reliable than the unstructured approach used here.

Second, this Court in *Barefoot* stated that it was "unconvinced, ... at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case." 463 U.S. at 901. But scientific research now reveals that unstructured "expert" testimony on future dangerousness like Dr. Coons's, despite its lack of scientific basis, influences jurors more than opinions based on structured risk-assessment methods. Moreover, jurors' reliance on clinical expert testimony persists even after exposure to adversary procedures like cross-examination and the presentation of competing experts, and even after deliberations. These empirically demonstrated realities render the admission of testimony like Dr. Coons's in capital cases especially problematic because they suggest a real risk of prejudice that cannot effectively be combated through traditional adversarial measures.

Indeed, to be admissible in *non-capital* federal trials under this Court's precedent, expert testimony must be sufficiently reliable to assist factfinders in understanding a factual issue. *Daubert*, 509 U.S. at 589-

590; *see* Fed. R. Evid. 702.[6] Such a requirement ensures that unfounded claims of expertise not mislead finders of fact. *See Daubert*, 509 U.S. at 594-595; *see also, e.g.*, *United States* v. *Bahena*, 223 F.3d 797, 809 (8th Cir. 2000) ("*Daubert* serves the important purpose of allowing the judge to ... screen out evidence that is unreliable and would have a tendency to confuse or mislead the jury."). Left undisturbed, the TCCA's decision means that, in *capital* cases, the Constitution provides no baseline of protection against precisely that danger—a danger that empirical evidence shows to be significant in cases like this one.[7]

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[6] Texas courts have adopted a similar test to that in *Daubert*, 509 U.S. at 593-594, to consider the admissibility of expert testimony under state law, *see Kelly* v. *State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (en banc), including in capital cases (*see* Pet. App. 27a-44a).

[7] The question is not whether *Daubert* or any particular formulation is constitutionally mandated, but whether the Eighth Amendment requires *some* minimum level of reliability when government witnesses claim special expertise. Whether *Daubert* applies directly or by analogy in the federal capital sentencing context is an open question. *Compare United States* v. *Fields*, 483 F.3d 313, 341-343 (5th Cir. 2007) (holding that *Daubert* does not apply), *with United States* v. *Barnette*, 211 F.3d 803, 815 (4th Cir. 2000) (assuming without deciding that *Daubert* applies). Nonetheless, as a statutory matter, federal law at a minimum requires that the probative value of evidence offered in the penalty phase of a capital trial outweigh its prejudicial effect. 18 U.S.C. § 3593(c).

ARGUMENT

I. Unstructured Clinical Testimony Like That At Issue Is Not Based On Science And Should Not Be Relied Upon To Establish Future Dangerousness

The TCCA recognized that Dr. Coons's assessment of Mr. Coble's future dangerousness—which did not follow any scientifically established methodology and was not based upon any empirical study—was insufficiently reliable to satisfy normal evidentiary standards. Pet. App. 43a-44a. Studies have long established that unstructured clinical approaches, like the one Dr. Coons employed, cannot assess future dangerousness with reliability comparable to structured approaches. It is now widely accepted that "[u]nstructured clinical judgment by itself is no longer a useful or necessary approach to appraising violence risk." Heilbrun et al., *Violence Risk Assessment Tools*, in *Handbook of Violence Risk Assessment* 1, 5 (Otto & Douglas eds., 2010).

The unstructured clinical approach is "basically a 'free-form' approach to risk assessment" based solely on "the evaluator's judgment about risk unaided by additional materials." Heilbrun, *Evaluation for Risk of Violence in Adults* 52 (2009). This approach imposes no structure on any of the four key decisions in the assessment process: (1) determining which risk factors to consider; (2) determining how to measure them; (3) combining the factors into "a single overarching estimate of violence risk"; and (4) "generating a final risk estimate." Monahan, *Structured Risk Assessment of Violence*, in *Textbook of Violence Assessment and Management* 17, 20-21 (Simon & Tardiff eds., 2008).

Instead, "[w]hat these risk factors are, or how they are measured, might vary from case to case depending

on which seem most relevant to the professional doing the assessment." Monahan, *Structured Risk Assessment* 19. The evaluator then combines the risk factors in an "intuitive" manner to generate an opinion about an individual's level of violence risk. *Id.*

This lack of structure allows cognitive biases to skew the future-dangerousness analysis. These biases include:

> (a) ignoring base-rate information (not knowing or not using the rate at which the predicted event occurs in the population of interest); (b) assigning nonoptimal weights to factors (combining and weighing factors based on intuitive judgments ...); and (c) employing the representativeness heuristic (the tendency to make decisions or judge information in a manner that fits preconceived categories or stereotypes of a situation ...)[.]

Krauss & Lieberman, *Expert Testimony on Risk and Future Dangerousness*, in *Expert Psychological Testimony for the Courts* 227, 229 (Costanzo et al. eds., 2006); *see also* Krauss & Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision-Making in Capital Sentencing*, 7 Psychol. Pub. Pol'y & Law 267, 280 (2001) (confirmation bias can result in overestimating dangerousness due to evaluators' propensity "to ignore evidence that disconfirms their initial opinion" while continuing "to select information that supports it"). Additionally, those employing unstructured clinical approaches often make the "fundamental attribution error," which causes individuals to incorrectly perceive that another's behavior is based on stable dispositions (*i.e.*, traits) rather than situational

contexts. Melton et al., *Psychological Evaluations for the Courts* 300 (3d ed. 2007).

Such biases can render the future-dangerousness assessment unreliable. For example, evaluators using unstructured clinical approaches often fail to take into account the "base rate"[8] of violence in the subject's particular population. Heilbrun, *Evaluation for Risk of Violence* 45-46. "[I]gnorance of base rates ... [is] one of the most serious shortcomings associated with violence risk assessment" because the base rate of violence in the relevant population (*e.g.*, prison, hospital, or community) directly affects the accuracy of the assessment of an individual's future dangerousness. *Id.* at 46. Where base rates are not considered, any assessment would necessarily be "skewed" because "there is no basis for comparison of a given individual to 'average' propensities" for the trait being examined.[9] Sandys et al., *Aggravation and Mitigation*, 37 J. Psychiatry & L. 189, 213 (2009); *see also* DeMatteo et al., *Forensic Mental Health Assessments in Death Penalty Cases* 270 (2011) ("Base rates allow us to tether risk estimates to known facts—in the form of group data—rather than to intuition or assumptions."). Failure to account for low base rates often causes evaluators to over-predict the likeli-

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[8] The base rate is the frequency that a particular behavior occurs within a specified population over a specified time period. *See* Sandys et al., *Aggravation and Mitigation*, 37 J. Psychiatry & L. 189, 213 (2009) (base rates measure the "statistical prevalence of a particular behavior over a set period of time" (internal quotation marks omitted)).

[9] For example, if an individual is at "twice" the risk of having a particular disease, it matters whether that person belongs to a population with a base rate of one-in-ten chance or one-in-one-thousand chance of having that disease.

hood of violence. Additionally, an evaluator using unstructured clinical analysis might intuitively—but incorrectly—"place excessive weight on the heinousness of the defendant's most recent act (a factor not commonly associated with future violence) in arriving at a conclusion that the defendant will be dangerous in the future." Krauss & Lieberman, *Expert Testimony* 229.

Early studies indicated that unstructured clinical assessments of future dangerousness were "accurate in no more than one out of three predictions of violent behavior over a several-year period." Monahan, *The Clinical Prediction of Violent Behavior* 47 (1981). Since those early studies, "[l]ittle has transpired ... to increase confidence in the ability of mental health professionals, using their unstructured clinical judgment, to accurately assess risk of violence in the community." Monahan, *Structured Risk Assessment* 19. The unstructured clinical mode of analysis has been consistently found only slightly more reliable than chance in assessing future dangerousness. *See, e.g.*, Mossman, *Assessing Predictions of Violence*, 62 J. Consulting & Clinical Psychol. 783, 790 (1994).

Dr. Coons's analysis in this case reflects the flaws typical of unstructured clinical assessments. For instance, there is no indication that Dr. Coons accounted for any base rates (in the community or in prison), an error that, as discussed *supra* p. 10, can severely skew any risk analysis. Moreover, even if he had considered the base rate of violence in prison where Mr. Coble would most likely spend the rest of his life if spared the death penalty,[10] that low rate would have rendered his

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[10] Although not the exclusive focus of the future-dangerousness issue, the TCCA acknowledged that, under Texas

unstructured assessment of Mr. Coble's future dangerousness flawed. Low base rates of prison violence, if not properly accounted for, result in an unacceptably high number of false predictions that subjects are likely to commit future violent acts. Monahan, *Clinical Prediction* 33 ("[I]t is virtually impossible to predict any 'low base rate' event without at the same time erroneously pointing the finger at many false positives."). Although structured risk-assessment approaches, discussed *infra* Part II, can account for such difficulties, the low base rate of prison violence makes the *unstructured* prediction of future dangerousness of individuals in prison exceedingly difficult. *See* Cunningham et al., *An Actuarial Model for Assessment of Prison Violence Risk Among Maximum Security Inmates*, 12 Assessment 40, 40 (Mar. 2005).

Dr. Coons's assessment also relied heavily on Mr. Coble's history of violence and past behavior in the community, factors that studies have demonstrated have little correlation with an individual's propensity for violence in prison. *See* Cunningham, 12 Assessment at 42. In other words, Dr. Coons intuitively selected factors he believed were likely to predict future violence (Pet. App. 24a-25a), rather than relying on factors that have been empirically demonstrated to relate to the risk of future violence among individuals in a particular context.

In sum, "a substantial body of research suggests that expert predictions of future dangerousness, when based solely on the testifying expert's clinical experi-

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law, "the likelihood that a defendant does not or will not pose a heightened risk of violence in the structured prison community is a relevant, indeed important, criterion." Pet. App. 19a-20a.

ence, demonstrate an unimpressive ability to accurately forecast the long-term future behavior of criminal defendants." Krauss & Lee, *Deliberating on Dangerousness and Death*, 26 Int'l J. of L. & Psychiatry 113, 113-114 (2003). Accordingly, as the TCCA concluded here, unstructured clinical assessments of future dangerousness like Dr. Coons's are insufficiently reliable to satisfy ordinary *Daubert*-like evidentiary standards. This Court should accept this case to determine whether their admission is consistent with the Eighth Amendment's heightened reliability requirement in capital cases. *See, e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 190 (1976).

II. In Contrast To Dr. Coons's Unstructured Approach, Structured Risk-Assessment Methods Are Scientifically Based And Can Reliably Inform Assessments Of Future Dangerousness In A Variety Of Contexts

In *Barefoot*, this Court expressed concern that concluding "that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made." *Barefoot* v. *Estelle*, 463 U.S. 880, 898 (1983) (referring to civil commitment). Since *Barefoot*, however, researchers have developed better methods of assessing future dangerousness in a number of contexts. *See* Monahan, *Violence Risk Assessment*, in 11 *Handbook of Psychology* §§ 1.1, 4-5 (Goldstein & Weiner eds., 2003). These "structured" approaches, grounded in science and empirical data, have proven more reliable than unstructured clinical approaches and can validly assess future dangerousness in appropriate cases. *See id.* § 4 (describing "general superiority of statistical

over clinical risk assessment"). Progress since *Barefoot* therefore has substantially addressed the Court's concern about "other contexts."

A. Structured Risk-Assessment Methods Are Grounded In Scientific Methods And Are Reliably Used To Assess Future Dangerousness In Many Contexts

In the last two decades, mental health professionals have made much progress in developing three risk-assessment approaches that are based on scientific principles and can be reliable in assessing risk of future dangerousness in appropriate cases. These three methods—(1) actuarial assessment, (2) structured professional judgment, and (3) the anamnestic approach—incorporate varying degrees of structure in one or more of the four steps of the risk-assessment process. *See supra* p. 7. The use of predetermined methodologies or factors empirically proven to relate to future violence provides the structure on which these approaches are based. Monahan, *Structured Risk Assessment* 20-21; Heilbrun et al., *Violence Risk Assessment Tools* 5-6.

The actuarial approach uses statistical information according to clear rules. The "defining feature of actuarial assessment entails using an objective, mechanistic, reproducible combination of predictive factors, selected and verified through empirical research against known outcomes." Heilbrun, *Evaluation for Risk of Violence* 53. The actuarial approach structures and determines in advance all four components of risk assessment. *See* Skeem & Monahan, *Current Directions in Violence Risk Assessment*, 20 Current Directions in Psychol. Sci. 38, 39 (2011). For instance, to assess future dangerousness in the community, evaluators rely on "empirically verified risk factors" that "have demon-

strated the ability to predict the outcome of interest for the population being studied." Krauss & Lieberman, *Expert Testimony* 231. These predetermined risk factors are combined in a predetermined formula (i.e., through an algorithm or equation) to generate an estimate of the probability of risk attributed to an individual with a score in a certain range.

Mental-health professionals currently use a number of actuarial tools to assess future dangerousness in a variety of settings. For example, the Violence Risk Appraisal Guide ("VRAG") assesses the risk of future violence in the community among mentally ill offenders upon their release from prison or forensic hospitalization. Monahan, *Structured Risk Assessment* 26-27. The VRAG measures twelve predetermined factors statistically shown to correlate with a risk of violence in mentally ill persons. *Id.* at 27. Each of these factors "is statistically weighted, and the weighted scores are summed together to yield an overall estimate of violence risk." *Id.* This tool has proven successful in assessing mentally ill offenders' potential for violence. *Id.* (recent study showed 11% of patients who scored in the lowest category of violence risk on the VRAG were found to have committed a new violent act, compared with 42% of patients in the middle category and 100% of patients in the highest category).

A second approach, structured (or guided) professional judgment ("SPJ"), "combine[s] the benefits of actuarial instruments with the flexibility of clinical judgments." Krauss & Lieberman, *Expert Testimony* 232. As opposed to the actuarial approach, which structures all four risk assessment components (and the unstructured approach, which structures none of them), this method structures only the first two. Specifically, SPJ uses predetermined risk factors that have been

empirically shown to relate to an increased risk of violence. *Id.* at 233. In addition, the method of measuring those risk factors is predetermined using specified procedures rather than left to the evaluator's discretion. *See* Skeem & Monahan, *Current Directions* 39. Unlike the actuarial approach, however, SPJ allows for evaluator discretion at the final two stages of the risk-assessment inquiry, the combination of factors and the ultimate risk estimate that includes consideration of case-specific facts. *See* Krauss & Lieberman, *Expert Testimony* 233.

Many professionally accepted risk-assessment tools incorporate SPJ and have been successfully used. For instance, the HCR-20 is an SPJ tool used to assess the future dangerousness of mental patients, including those who are involuntarily hospitalized following acquittal of criminal charges by reason of insanity. *See* Monahan, *Structured Risk Assessment* 21-22. The HCR-20 uses twenty ratings consisting of historical, clinical, and risk management factors selected based on dozens of empirical studies of factors likely to indicate a risk of future violence. *Id.* at 22. Each factor is measured on a scale that assesses points based on the extent to which the factor is present. *Id.* The HCR-20 then allows the evaluator to exercise discretion in combining the factors and reaching an overall risk estimate. *Id.* The HCR-20 has been effective: One study that followed formerly committed individuals with mental disorders after their release into the community found that 11% of the patients that scored in the lowest risk category of the HCR-20 committed or threatened a physically violent act, compared with 40% of those in the middle category and 75% of those in the highest-risk category. *Id.* at 21.

Another tool, the Classification of Violence Risk ("COVR"), is a computer program designed to assess the probability that an individual with a mental disorder will behave violently toward others. *See* Monahan, *Structured Risk Assessment* 23-24. The COVR structures the selection and measurement of risk factors and how those factors are combined to yield a risk estimate in one of five categories. *Id.* at 23, 30. Specifically, the COVR program can measure up to forty predetermined risk factors. *Id.* at 23. The program then uses an interactive "classification tree methodology" to combine the risk factors. *Id.* at 23-24. Before making a final risk determination, the evaluator considers the results generated by the program in the context of additional information such as interviews with the subject's family, medical records, and clinical interviews. *Id.* at 24. Although currently less extensively studied than the HCR-20 or the VRAG, the COVR has also proven effective. In one study, 9% of the patients assessed using COVR as being at a low risk for violence committed a violent act, compared to 49% who were assessed as high risk. Monahan et al., *An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders*, 56 Psychiatric Servs. 810, 814 (2005) ("proportion of patients who were successfully classified was 76 percent").

Finally, the anamnestic approach involves a detailed consideration of an individual's life history to determine which risk factors associated with past acts of violence are now present. This approach requires extensive interviews of the subject, corroborated by collateral information about the specific incidents and circumstances on which the analysis relies. Heilbrun et al., *Violence Risk Assessment Tools* 6. For instance, an individual may be questioned regarding thoughts, feel-

ings, behaviors, and situationally relevant details (*e.g.*, whether alcohol or drugs were involved) associated with each prior violent act. *Id.* The evaluator then detects patterns based on the subject's answers and determines which risk factors apply based on the subject's individual history. Heilbrun, *Evaluation for Risk of Violence* 55. The evaluator can also use information learned during this process to increase the accuracy of the ratings of the individualized risk factors if a formal risk-assessment tool is used. Heilbrun et al., *Violence Risk Assessment Tools* 6. Intended for use in conjunction with other structured risk-assessment approaches, the "strength of [the] anamnestic assessment involves the identification of risk factors and the gauging of patterns that are directly applicable to the individual being served." Heilbrun, *Evaluation for Risk of Violence* 55.

Dr. Coons's methodology should not be mistaken for an anamnestic approach. Dr. Coons failed to rely on factors empirically demonstrated to correlate with risk of future violence and did not identify individualized risk factors based on questioning of Mr. Coble regarding his history over the prior eighteen years. As Dr. Coons testified, his conclusions were based entirely on documents provided by the prosecution, including the report of an interview he performed with Mr. Coble eighteen years earlier. Dr. Coons did not "perform any psychiatric assessment of appellant after his eighteen years of nonviolent behavior on death row." Pet. App. 43a. Rather, Dr. Coons identified risk factors based solely on "his own personal methodology" (*id.* 24a), and whether a factor "'means something to [him] in terms of [his] education or experience or background'" (*id.* 25a).

B. Structured Risk-Assessment Tools Are Scientifically Grounded And Modestly But Consistently More Reliable Than The Unstructured Clinical Approach

In appropriate cases, expert testimony based on structured risk-assessment approaches can be scientifically reliable and provide a modest advantage over unstructured approaches. Indeed, "[t]here is a great deal of evidence that validated risk assessment tools provide a way of effectively distinguishing those at different levels of risk for violence, violent offending, and certain other antisocial outcomes." Heilbrun, *Evaluation for Risk of Violence* 74. Moreover, structured techniques have repeatedly "demonstrate[d] superiority to unstructured clinical judgment in forecasting dangerousness." Krauss & Lieberman, *Expert Testimony* 230; *see also* Monahan, *Structured Risk Assessment* 31.

For instance, a number of meta-analyses (which examine and statistically combine the results of several studies) provide "considerable evidence for the utility of the actuarial prediction of violent behavior, including criminal recidivism." Heilbrun et al., *Violence Risk Assessment Tools* 10. In a number of head-to-head comparisons, "[a]ctuarial-based risk predictions of future dangerousness have outperformed unstructured clinical judgments." Krauss & Lieberman, *Expert Testimony* 232. Likewise, multiple studies show that structured professional judgments "are significantly predictive of violent recidivism" and superior to the unstructured clinical approach. Heilbrun et al., *Violence Risk Assessment Tools* 12.

The "enhanced structure associated with" these approaches eliminates many of the problems that render unstructured clinical approaches unreliable. *See*

Heilbrun, *Evaluation for Risk of Violence* 64. For example, structured risk-assessment tools account for base rates. This minimizes the chance that an evaluator will ignore or incorrectly estimate that rate, which often occurs with unstructured approaches. *See id.* at 45–46. As discussed *supra* Part I, absent consideration of base rates, risk assessments are likely to be skewed because there is no basis to compare a particular individual to the average. Moreover, because they are based on established, peer-reviewed methodology with known error rates, structured approaches provide greater transparency, allowing the jury to make a more informed decision when evaluating expert conclusions. *Cf. Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (expert testimony "'can be both powerful and quite misleading because of the difficulty of evaluating it'").

To be sure, these more reliable approaches to assessing future dangerousness have largely been developed outside the capital context where populations of sufficient size have afforded the basis for analysis. Reliably assessing future dangerousness of capital offenders is more challenging, at least to the extent the law requires an assessment of future risk outside prison, because capital offenders spared the death penalty typically receive life in prison and consequently there is very little data with which to make the assessment. On the other hand, the fact that release into the community is rare means that the risk of future violence *in prison* is almost always the more relevant inquiry in the death penalty context. *See* Cunningham & Sorenson, *Capital Offenders in Texas Prisons*, 31 L. & Hum. Behav. 553, 554 (2007) (in assessing capital offenders' future dangerousness, "only prison is relevant or measurable" because "[c]urrent capital life inmates

face multi-decade prison confinement or life-without-parole"). And structured risk-assessment tools are currently being developed to increase the reliability of future-dangerousness assessments of capital offenders in prison. *See id.* at 555.[11]

III. Unstructured Clinical Risk-Assessment Testimony Is Unduly Persuasive To Juries

Admitting testimony based on unstructured clinical future-dangerousness assessments, like that offered by Dr. Coons, poses a special danger in capital cases. Despite the scientific invalidity of such evidence, research demonstrates that capital juries give it undue weight in their deliberations. The risk that such testimony will lead capital juries to the wrong conclusion is great. Whether the Constitution bars its admission is therefore significant because that question determines whether the constitutional harmless-error standard will apply.

Studies show that in determining whether to assess the death penalty, juries spend a significant amount of time deliberating a defendant's propensity for dangerousness. Where a jury must decide whether a defen-

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[11] Empirical evidence suggests that inmates serving life sentences have similar or lower rates of violence than other offenders. Sorensen & Cunningham, *Conviction Offense and Prison Violence*, 56 Crime & Delinquency 103, 105, 122-123 (2010). As discussed *supra* Part I, "[l]ow base rates of serious violent misconduct in prison are a primary barrier to any predictive scheme," Cunningham et al., 12 Assessment at 40, and are a particular barrier to unstructured clinical judgments such as Dr. Coons's. However, structured risk-assessment tools (such as the Risk Assessment Scale for Prison) are being developed to increase the reliability of such assessments by taking account of those low base rates.

dant poses a future danger before it can impose the death penalty, "[v]irtually all [jury] disagreements and prolonged discussions concerned" future dangerousness. Costanzo & Costanzo, *Life or Death Decisions*, 18 L. & Hum. Behav. 151, 168 (1994). Even when a future-dangerousness finding is not a prerequisite to a capital sentence, "topics related to the defendant's dangerousness should he ever return to society ... are second only to the crime itself in the attention they receive during the jury's penalty phase deliberations." Blume et al., *Future Dangerousness in Capital Cases*, 86 Cornell L. Rev. 397, 404 (2001). This is true even when the prosecution has made little to no mention of the issue. *See id.* at 406-407.

Moreover, empirical data demonstrate that purportedly expert testimony regarding a defendant's future dangerousness "strongly affects final outcomes when it is presented." Krauss & Sales, 7 Psychol., Pub. Pol'y & L. at 274. Because jurors are already inclined to believe that a capital defendant poses a future danger, they tend to overvalue expert assessments confirming those beliefs. Showalter & Bonnie, *Psychiatrists and Capital Sentencing*, 12 Bull. Am. Acad. Psychiatry L. 159, 165 (1984). In fact, studies indicate that jurors are often less influenced by the content of an expert's testimony than by his mere presence or credentials. *See* Greenberg & Wursten, 19 *The Psychologist and the Psychiatrist as Expert Witnesses*, Prof. Psychol., Res. & Prac. 373, 376-377 (1988).

Strong evidence suggests that jurors weigh unstructured clinical testimony regarding a defendant's future dangerousness more heavily than empirically based risk-assessment approaches across a variety of legal contexts, Krauss & Sales, 7 Psychol., Pub. Pol'y & L. at 305; *see also* Sandys et al., 37 J. Psychiatry & L. at

217 (mock jurors "rate clinical opinion as equally scientific, more persuasive and more influential than actuarial testimony"), even though their relative scientific value is precisely the reverse. Although empirically based instruments "have improved the accuracy of [future-dangerousness] predictions" and "outperform[ed] clinical assessments," jurors continue to place greater weight on unstructured clinical expert testimony. Sandys et al., 37 J. Psychiatry & L. at 217 (citing studies); *see also supra* Part II. Researchers have hypothesized that this is so because unlike anecdotal or individualized data about the defendant, jurors have greater difficulty processing "complex and statistical information." *Id.* at 218; *see also* Cutler & Kovera, *Expert Psychological Testimony*, 20 Current Directions in Psychol. Sci. 53, 55-56 (2011) (jurors may have difficulty distinguishing valid research from "junk science").

Notably, jurors' reliance on clinical expert testimony persists even after exposure to adversary procedures like cross-examination and the presentation of competing experts. Krauss & Sales, 7 Psychol., Pub. Pol'y & L. at 302, 305. These effects have also been found after juries are allowed to deliberate. Krauss & Lee, 26 Int'l J. of L. & Psychiatry at 116-117, 130-131. This research indicating that the presentation of additional evidence cannot undo the prejudicial effect of unreliable unstructured clinical testimony calls into question one of the core premises in *Barefoot*: that the adversary process may be trusted "to sort out the reliable from the unreliable evidence" especially when the defendant "has the opportunity to present his own side of the case." *See* 463 U.S. at 901.

The empirical evidence also strongly suggests that although Dr. Coons's testimony—which the Texas court held was "insufficiently reliable" (Pet. App.

22a)—added nothing probative on the future-dangerousness issue, it likely had a significant prejudicial effect on jury deliberations. *Id.* 42a ("[s]ome of Dr. Coons's factors have great intuitive appeal to jurors and judges"). As one judge has explained, "the problem here ... is not the introduction of one man's opinion on future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as an 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact." *Flores* v. *Johnson*, 210 F.3d 456, 465-466 (5th Cir. 2000) (Garza, J., concurring). Because capital juries tend to give far greater weight to clinical as opposed to statistical expert testimony, the defense's presentation of statistical expert testimony in this case cannot eliminate the taint of Dr. Coons's testimony.

CONCLUSION

For the foregoing reasons and as set forth in Mr. Coble's petition, the Court should grant certiorari.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BILLIE WAYNE COBLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR CAPACITY FOR JUSTICE, DISABILITY RIGHTS TEXAS, TEXAS APPLESEED, AND THE NATIONAL ALLIANCE ON MENTAL ILLNESS OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Capacity for Justice ("C4J") is a Texas non-profit corporation, founded in 1995, with a mission to increase the objectivity and validity of psycho-legal elements in juvenile and criminal forensic evaluations. C4J's work focuses on respondents and defendants with mental illnesses, intellectual disabilities, or concurrent mental and substance use disorders. C4J conducts research and training and compiles a registry of professionals whose credentials are consistent with the Texas statutory requirements for evaluating incompetency to stand trial and the insanity defense.

Disability Rights Texas (formerly known as Advocacy Incorporated) ("DRTx") provides legal protection and advocacy for Texans with disabilities. DRTx's attorneys provide direct legal assistance to people with disabilities as well as protecting the rights of individuals and groups with disabilities through the courts and the justice system. DRTx also advocates for laws and public policies that protect and advance the rights of people with disabilities.

Texas Appleseed ("Appleseed") is a non-profit organization that advocates for equal justice for persons with mental illnesses or intellectual disabilities.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have each been given at least 10 days notice of amici's intention to file this brief and have consented to such filing. Those consents are being lodged herewith.

Appleseed has developed widely used resources for attorneys and judges and has provided training and technical assistance to counties creating new programs aimed at decriminalizing the symptoms of mental illness and intellectual disability by diverting offenders away from the criminal justice system and into community-based treatment. Appleseed recognizes that requiring compliance with long-recognized standards for scientific reliability in the testimony of expert mental health witnesses is imperative to assuring equal justice.

The National Alliance on Mental Illness of Texas ("NAMI Texas") is a not-for-profit membership organization that is a state affiliate of the National Alliance on Mental Illness. The mission of NAMI Texas is to improve the lives of all persons affected by serious mental illness by providing support, education, and advocacy through a grassroots network.

Amici file this brief in support of Petitioner Billie Wayne Coble to highlight the significance to Texans with mental disabilities and the Texas mental health community of this Court's review of the extent to which a mental health professional can reliably testify to a defendant's future dangerousness in a capital case.

SUMMARY OF THE ARGUMENT

Amici urge the Court to grant the Petitioner's writ of certiorari to address the significant legal and constitutional errors in *Coble v. Texas*, 330 S.W.3d 253 (Tex. Crim. App. 2010). Specifically, review by this Court is necessary to address the Texas Court of Criminal Appeals's overreaching and unconstitutional extension of this Court's precedent in *Barefoot v. Estelle*,[2] regarding testimony and evidence related to Texas's "probability of future violence" element in capital punishment cases.

In *Coble*, the Texas Court of Criminal Appeals (the "CCA") recognized the significant influence a licensed medical expert, such as a psychiatrist, may have on jurors and found that the State's so-called expert predictions about Mr. Coble's future dangerousness were unreliable under the rules of evidence. Yet, the Texas court presumed the testimony was constitutional under this Court's precedent in *Barefoot*[3] without regard to subsequent precedent governing expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] and its progeny. Finding no constitutional-level harm from admission of the improper testimony, the Texas court affirmed Mr. Coble's death sentence notwithstanding the acknowledged error.

Review is necessary to harmonize this Court's prior precedent in *Barefoot* with the standards established in *Daubert*. The failure to address this constitutional issue

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2. 463 U.S. 880 (1983).

3. *Id.*

4. 509 U.S. 579 (1993).

will result in the continued use of unreliable, unscientific methods for determining future dangerousness in Texas capital punishment cases. Further, beyond the capital punishment context, the Texas court's ruling in *Coble* creates confusion about what standards govern mental health expert testimony. Amici thus urge this Court to grant the Petitioner's writ of certiorari to address Texas's extension of *Barefoot*, to harmonize *Barefoot* with this Court's subsequent holding in *Daubert*, and to affirm the need for reliable mental health testimony in capital punishment cases involving the question of future dangerousness.

ARGUMENT

A. The unreliable testimony on future dangerousness proffered in *Coble* is a recurring event.

1. The testimony offered by the State in *Coble* to support future dangerousness is unreliable.

In September 2008, after the Fifth Circuit vacated Mr. Coble's death sentence, the trial court held a capital resentencing hearing.[5] At the hearing, the defense presented uncontroverted evidence that Mr. Coble had not received a single disciplinary notice in nearly twenty years on Texas's death row.

In addition, the defense called a forensic psychologist, Dr. Mark Cunningham, who has studied and published extensively in the field of violence risk assessment. He testified that Mr. Coble had a low probability of committing

5. *Coble*, 330 S.W.3d at 261.

a future act of serious violence based on a statistical risk assessment approach that utilizes actuarial data about violence in prison.[6] Dr. Cunningham's methodology is documented in a number of published, peer-reviewed periodicals and he explained that using this approach, he has been able to calculate an error rate of less than two percent for all cases in which he has testified.[7]

In contrast, the State's case-in-chief primarily consisted of lay witness testimony and a report prepared in 1964 by a psychiatrist who had evaluated Mr. Coble when he was fifteen years old. To satisfy the element of future dangerousness required to sentence a defendant to death under Texas law, the State did not rely on any verifiable scientific methods that could accurately predict such dangerousness. Instead, the State presented the opinion of psychiatrist Dr. Richard Coons.[8]

Dr. Coons is no stranger to capital murder trials. According to his own testimony, he has evaluated future dangerousness in 150 capital cases and testified in 50 of those cases.[9] By his own admission, Dr. Coons's conclusions are based on a non-peer-reviewed system that relies heavily upon his own gut instincts.[10] His conclusions do not derive from a textbook and are not found in any particular journal. He cannot identify any

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6. 27 RR 95-123, 125-30, 204-05.

7. 27 RR 122, 189.

8. 24 RR 9, 11, 202.

9. 24 RR 204, 206.

10. 24 RR 208-09.

studies supporting his methodology.[11] He does not consider a standardized list of factors, nor is his methodology shared by forensic psychiatrists across the board.[12] In fact, he specifically refers to past behavior as the best predictor of the future, but agrees that psychiatrists might disagree about whether past conduct would predict future conduct.[13] He also is not aware of any studies on the accuracy or error rates of long-term predictions of future violence.[14] Dr. Coons has not obtained any records to determine whether his prior testimony was accurate. Nor does he know what his accuracy rate is.[15]

Dr. Coons interviewed Mr. Coble before testifying in his 1990 trial, but he since lost his interview notes.[16] At the resentencing hearing, the prosecution asked Dr. Coons a long, hypothetical question, spanning nine pages of the transcript, and based on 57 assumptions.[17] At the end of the hypothetical, the prosecutor asked whether Dr. Coons could "make a determination as to whether ... there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society?"[18] Dr. Coons responded, "[t]here is a probability

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11. 24 RR 156-57, 188-89, 196-97.

12. 24 RR 157.

13. 24 RR 160-61.

14. 24 RR 188-89.

15. 24 RR 195-96.

16. 24 RR 210-11.

17. 24 RR 211-19.

18. 24 RR 211-19.

he would do that."[19] He reached his opinion based on the facts of the crime, Mr. Coble's "attitude about violence," and Mr. Coble's "weak" and "defective" conscience.[20] Discounting the evidence of Mr. Coble's consistently good behavior while incarcerated, Dr. Coons repeatedly testified about his personal belief, not founded in any research or studies, that all death row inmates "mind their behavior" because they have pending appeals and have an incentive to avoid developing a bad record in the event of a retrial.[21]

The prosecution argued in both its opening and closing arguments that the jury should credit Dr. Coons's conclusion – that Mr. Coble has no conscience and no regard for human beings and thus is likely to commit future criminal acts of violence – because "it's just common sense."[22] Despite Mr. Coble's two decades of exemplary behavior since he was first incarcerated, the State argued that Mr. Coble is a "dangerous person," and that "if he is the same person today, as the evidence shows he is, then he is absolutely dangerous."[23]

The CCA ruled that the prosecution did not prove the scientific reliability of Dr. Coons's method for predicting

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19. 24 RR 219.

20. 24 RR 219-23.

21. 24 RR 209-10, 223-24.

22. 29 RR 124; *see also*, 29 RR 170 (describing Dr. Coons's approach as "remarkably commonsensical").

23. 29 RR 122.

future dangerousness.[24] The court noted there was no proof that the factors relied on by Dr. Coons were accepted by the forensic psychiatric community, and that the method used by Dr. Coons had never been empirically validated or verified as accurate.[25] Yet, despite the almost universal recognition of the harmful impact of unscientific, unverifiable, and unreliable expert testimony in non-capital cases, the CCA found the admission of Dr. Coons's erroneous testimony harmless and allowed Mr. Coble's death sentence to stand.

2. The unreliable so-called expert testimony proffered by Dr. Coons in Mr. Coble's sentencing hearing is not an isolated occurrence.

There is no established protocol on how to assess future dangerousness in Texas death penalty cases. However, in many such cases, sometimes without even meeting the defendant, a psychiatrist or psychologist called by the state testifies that a defendant will constitute a continuing threat to society based solely on a hypothetical fact pattern presented by the prosecutor. The hypothetical question incorporates the facts of the specific crime for which the defendant has been convicted as well as his previous crimes, and invariably omits any positive information. These hypothetical fact patterns are routinely admitted despite being "simply subjective testimony without any scientific validity."[26] There is no

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24. *Coble*, 330 S.W.3d at 279-80.

25. *Id.* at 278-79.

26. *Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000) (Garza, J., specially concurring).

consistent methodology applied or required for these analyses and "standards controlling the operation of the technique are nonexistent."[27] The testimony is virtually the same in every case. Indeed, the State tends to use the same few witnesses in every case, including Dr. Coons, who has testified consistently for the State for decades.

For instance, Dr. Coons testified in the capital murder trial of David Lee Powell. In that case, he told the jury that Mr. Powell would commit further "criminal acts of violence that would constitute a continuing threat to society." Mr. Powell was sentenced to death.[28] Some additional examples of Dr. Coons's testimony on future dangerousness are listed below. In these examples, Dr. Coons concludes that the defendant would pose a continuing threat to society based primarily on the defendant's offense and prior history. Seldom does he interview the defendant and he typically dismisses a defendant's good conduct since incarceration as irrelevant to his analysis.

- *Allen v. State*[29] (future dangerousness prediction based on nature of present offense, history of

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27. *Id.* at 465.

28. Mr. Powell's death sentence was overturned by this Court in *Powell v. Texas*, 492 U.S. 680 (1989) after this Court found that neither Powell nor his attorney was notified that Powell would be examined by Dr. Coons on the issue of his future dangerousness to society, in violation of his Sixth Amendment Rights. He was tried again and Dr. Coons testified again at the retrial. Again he testified that Mr. Powell was a danger to society, and Mr. Powell was sentenced to death once more.

29. 2006 Tex. Crim. App. LEXIS 2545, at *17-19 (Tex. Crim. App. June 28, 2006).

violence, and un-interviewed defendant's lack of remorse).

- *Lagrone v. Cockrell*[30] (future dangerousness prediction based on State's hypothetical questions that copied defendant's circumstances as found in the case file).

- *United States v. Fields*[31] (future dangerousness prediction based on hypothetical, using facts that copied the defendant's circumstances, including the facts of the crime and defendant's background and criminal history).

- *Alba v. State*[32] (future dangerousness prediction based on thirteen-page hypothetical based on the facts of defendant's case).

- *Ramey v. State*[33] (future dangerousness prediction based on examination of statements, offense reports, pictures, and educational records).

- *Rivas v. Thaler*[34] (future dangerousness prediction based on defendant's history).

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30. 2002 U.S. Dist. LEXIS 10877, at *62-63 (N.D. Tex. June 17, 2002).

31. 483 F.3d 313, 341 (5th Cir. 2007).

32. 905 S.W.2d 581, 588 (Tex. Crim. App. 1995).

33. 2009 Tex. Crim. App. Unpub. LEXIS 124, at *45 (Tex. Crim. App. Feb. 11, 2009).

34. 2010 U.S. Dist. LEXIS 30304, at *9 (N.D. Tex. Jan. 22, 2010).

- *Soria v. State*[35] (future dangerousness based on hypothetical tracking the facts of the case).

Time and again, without any real knowledge of the defendant, and no scientific data or peer-approved methodology, Dr. Coons has testified based largely on the violent nature of the alleged crime and his own gut instinct that the defendant will pose a future danger.[36]

3. Other experts purport to predict future dangerousness using gut instinct rather than reliable data with negative consequences for the accused and the State.

Dr. Coons is not the only psychiatrist in Texas utilizing unreliable methods in capital cases. Indeed, preceding Dr. Coons, Dr. James Grigson – who achieved notoriety as "Dr. Death" for his unambiguous guarantees of future dangerousness – was expelled from the American Psychiatric Association (APA) because he consistently testified as to a defendant's future dangerousness based on categorical predictions without examining the defendant.[37] By 1991, Grigson claimed to have testified

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35. 933 S.W.2d 46, 50 (Tex. Crim. App. 1996).

36. *See also Espada v. State*, 2008 Tex. Crim. App. Unpub. LEXIS 806 (Tex. Crim. App. Nov. 6, 2008) (future dangerousness prediction based on defendant's history, personality, physical abilities, and lack of remorse).

37. Bruce Vincent, "Dr. Death:" *The Once Ubiquitous James Grigson Now Finds Little Demand for his Testimony in Texas Capital Murder Sentencings*, TEX. LAWYER, Dec. 4, 1995, at 4.

for the prosecution in 136 capital cases in Texas.[38] One Texas judge noted:

> It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty....When Dr. Grigson speaks to a lay jury...the defendant should stop what he is then doing and commence writing out his last will and testament – because he will in all probability soon be ordered by the trial judge to suffer a premature death.[39]

Notwithstanding the APA's censure of Dr. Grigson's predictions, Dr. Coons, along with many other experts testifying on behalf of the State, continue to make consistent predictions of future dangerousness without concrete data to support their instincts. These "experts" include psychiatrists Dr. John Holbrook, Dr. Edward Gripon, Dr. Clay Griffith,[40] and psychologist Dr. Walter Quijano.

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38. *Clark v. State*, 881 S.W.2d 682, 695 (Tex. Crim. App. 1994).

39. *Bennett v. State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

40. Dr. Griffith has examined over 8,000 people charged with criminal offenses and has testified in 100 to 150 capital murder trials in Texas and other states. *Flores*, 210 F.3d at 462 (Garza, J., specially concurring).

In response to the question regarding future dangerousness, a search of cases in which there are published opinions reveals that Dr. Griffith has testified "yes" on 22 occasions and "no" on zero occasions.[41] Judge Emilio Garza of the Fifth Circuit has described Dr. Griffith's opinions as "simply subjective testimony without any scientific validity by one who holds a medical degree."[42] Dr. Quijano utilized a number of unreliable factors to determine future dangerousness, including testifying that minority races, notably Hispanics, are more likely to engage in crime,[43] and noting that poor people are more "risky than non-poor people."[44]

None of these so-called experts use reliable peer-approved scientific methods to support their conclusions. Yet, this type of testimony is used over and over by the prosecution to push for the death penalty.

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41. *Id.* at 462 n.7.

42. *Id.* at 458.

43. *Saldano v. State*, 70 S.W.3d 873, 884-85 (Tex. Crim. App. 2002).

44. Texas Defender Service, *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness*, at 33 (2004) (citing Testimony of Dr. Walter Quijano, Statement of Facts, Vol. 70 at 855, *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1994)).

B. Although Dr. Coons's "methodology" is unreliable, there are scientific methods that offer reliable means of predicting future dangerousness.

1. Studies show clinical judgment predictions of future dangerousness of the kind utilized by Dr. Coons are not accurate.

Studies have shown that predictions that a defendant will be dangerous in the future based on ad hoc, substantive clinical judgment analyses such as those used by Dr. Coons are highly inaccurate.[45] For example, one study states that predictions of future dangerousness made by these state-paid witnesses have not been proven to be true in ***95% of the cases.***[46]

In some instances, it has been later proven that the defendant was actually innocent of the crime alleged.[47] In one case, after only a brief interview with the Defendant, Dr. Grigson testified:

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45. The dissent in *Barefoot* notes that the majority of the Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting).

46. *Deadly Speculation*, *supra* note 44, at 23.

47. *Id.* at 24-27. Coons, for example, testified that Michael Blair would be a future danger. Blair was later exonerated by DNA evidence. *See* 24 RR 244-45; *see also* Death Penalty Information Center, *Texas DNA Exoneration of Death Row Inmate Michael Blair Brings Innocence Total to 130*, *available at* http://www.deathpenaltyinfo.org/texas-dna-exoneration-death-row-inmate-michael-blair-brings-innocence-total-130.

> I would place Mr. Adams at the very extreme, worst or severe end of the scale. You can't get beyond that....There is nothing in the world today that is going to change this man....[48]

Adams was later freed after the real killer confessed to the crime. Adams spent more than twelve years in prison before being exonerated.[49] In yet another case, Kerry Max Cook spent twenty years on death row before being freed after DNA evidence implicated someone else.[50] Mr. Cook has committed no violent acts since his exoneration.[51]

In these cases, even actual innocence did not prevent the state's "experts" from testifying to the jury that the defendants would be a future danger to society.

2. More accurate and reliable scientific methods for measuring future dangerousness exist.

Research conducted during the 1980s initially failed to find reliable ways to predict a criminal defendant's future dangerousness.[52] More recently, however,

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48. *Id.* at 24-25 (citing Statement of Facts at 1410, *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979)).

49. *Id.* at 25.

50. *Id.* at 25; *see also* Northwestern University School of Law Center on Wrongful Convictions, *Kerry Max Cook, available at* http://www.law.northwestern.edu/wrongfulconvictions/exonerations/txCookSummary.html; *Cook v. State*, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991).

51. *Deadly Speculation*, *supra* note 44, at 26.

52. *See, e.g.*, John Monahan, U.S. Dep't of Health & Hum.

application of rigorous scientific methods has yielded more accurate results. There is now a substantial amount of scientific analysis regarding the ability of mental health professionals to predict the likelihood that a specific individual will commit future acts of violence.

Some of the verifiable methods being used to predict future violence include actuarial methods (identifying predictor variables and assigning a risk factor to the existence of such variables) and personality inventories (focusing on a list of personality variables in classifying a defendant's potential future conduct).[53] Recent studies support actuarial methods as one of the most, but not the only, accurate predictors of violence and certainly superior to individual judgment alone.[54]

Servs., *The Clinical Prediction of Violent Behavior* 47-49 (1981) (finding an approximately 66% error rate in predictions of future dangerousness by mental health professionals); *see also* Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, Am. Psychologist 831 (November 2006) ("[T]he field was still in its infancy in 1981 when *Estelle v. Smith* was decided and in 1983 when *Barefoot v. Estelle* was handed down. Neither the critical importance of base rate data (i.e., the frequency of violence in a given population in a particular context) nor the limitations of personality-based inferences had been well articulated.").

53. *See generally* John F. Edens, et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?,"* 29 L. Hum. Behav. 55, 65-76 (Feb. 2005) (analyzing and testing numerous methodologies and making recommendations).

54. *See* Jonathan R. Sorensen and Rocky L. Pilgrim, *An Actuarial Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. L. & Criminology 1251, 1257 (2000)

These more reliable, scientifically supported, and peer-tested methodologies for predicting future dangerousness have shown several things about clinical judgments. First, predictions of future dangerousness not based on a scientific methodology are inherently unreliable.[54] Clinical assessments are routinely criticized for ignoring the relatively low base rate of violent behavior in the relevant population subgroup, employing stereotypes and prejudices to reach predictions, and lack of error rates.[55]

Second, the likelihood of a criminal defendant committing murder once imprisoned is extremely remote – only about .2%.[57] Clinical predictions of future violence uniformly fail to take into account this low base rate of future violent behavior for permanently incarcerated individuals.[58]

(citation omitted); *see also* Daniel A. Krauss and Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psych. Pub. Pol. & L. 267, 279, 281 (June 2001); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 Wash. & Lee L. Rev. 353, 363 (Spring 2003).

55. *See* Edens, *Predictions of Future Dangerousness*, *supra* note 53, at 64.

56. *See* Beecher-Monas, *The Epistemology of Prediction*, *supra* note 54, at 362-63.

57. *See, e.g.*, Sorensen, *An Actuarial Assessment of Violence*, *supra* note 54, at 1256 (In study of Texas inmates convicted of murder, assessing overall likelihood of inmate-on-inmate homicide of only .2%); *see also* Edens, *Predictions of Future Dangerousness*, *supra* note 53, at 59.

58. *See* Beecher-Monas, *The Epistemology of Prediction*, *supra* note 54, at 362 ("Ignoring base rates is a particular problem

Third, several studies have analyzed violence by inmates convicted of capital murder, both on and off death row.[59] Specifically, the actuarial studies were tested by comparing the predictions to reports of actual violence within the prison population and more specifically within the population of convicted murderers.[60] Significantly, such studies reflect that rates of violence by former death-row inmates who were spared execution by commutation, retrial, or plea (but who remain incarcerated) are consistently low.[61]

Fourth, studies have shown that the severity of the immediate crime and a past history of violence – primary factors considered by Dr. Coons and others like him – are not reliable predictors of prison-based violence.[62] The prosecution's mental health professionals are criticized for viewing "an individual's past or present violent acts as stable character traits and not as environmentally caused

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in predicting violence when the base rate of violent behavior is low overall and varies among different population subgroups.").

59. *See, e.g.*, Edens, *Predictions of Future Dangerousness*, *supra* note 53, at 59, 64 (summarizing multiple studies).

60. *See* Sorensen, *An Actuarial Assessment of Violence*, *supra* note 54, at 1261-62.

61. *See* Edens, *Predictions of Future Dangerousness*, *supra* note 53, at 61-64.

62. *See, e.g.*, Krauss, *The Effects of Clinical and Scientific Expert Testimony*, *supra* note 54, at 279; *see also* Mark D. Cunningham, *Dangerousness and Death*, *supra* note 52, at 832 ("The reliability of a past pattern...approach , however, rests on two critically important elements: sufficient behavior to form a pattern and similarity to the context of prediction.").

events, leading them to incorrectly predict future acts of violence on the basis of violent disposition."[63] These witnesses for the State also tend to base predictions of future violence on stereotypes that ignore base rates of violence – "calculations of how common violent behavior is within a specific population" – which causes them to grossly overestimate "the likelihood that a specific individual will commit future violent acts."[64] As the literature consistently shows, the State's purported experts like Dr. Coons place undue emphasis on the crime itself – an act that is necessarily heinous – and consistently "ignore evidence that disconfirms their initial opinion."[65]

More reliable methodologies for determining future dangerousness, only a few of which are discussed above, now exist. Such methodologies not only provide reliability in predictions, but they also emphasize the lack of reliability in the type of clinical testimony proffered by Dr. Coons.

3. Texas's prediction of future dangerousness standard is an anomaly.

Texas is one of only two death penalty states that allows highly speculative evidence of future dangerousness to play a critical role in life and death decisions made by juries.[66]

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63. *Id.*

64. *Id.* at 280.

65. *Id.*

66. *Deadly Speculation*, *supra* note 44, at xv. Seven other states allow juries to consider future dangerousness in a limited

Additionally, while predicting danger from specific individuals is clearly a commonplace practice, for example in the context of civil commitments, these short-term predictions, repeatedly reviewed on their merits, are very different from the one-time, un-reconsidered prediction that takes place in a capital case. In Sexually Violent Predator commitments, for example, the commitment continues only "until the person's behavior abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence"[67] and is reviewed every two years.[68] Texas has established safeguards in these non-capital cases to ensure that evaluations of an individual's propensity for future violence are accurate. If these safeguards are employed in non-capital cases, similar or more strenuous safeguards should be used where a life is at stake.[69]

C. Expert testimony on future dangerousness should be weighed against tested, peer-reviewed methodologies and should not be allowed unless proved reliable under at least the *Daubert* standard; admission of unreliable testimony cannot be harmless in capital murder cases.

Texas defendants in capital cases are currently held hostage by a misinterpretation of this Court's prior holdings. The CCA in *Coble* cited this Court's opinion in *Barefoot v. Estelle*, claiming that it prohibits excluding

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way. The remaining 29 death penalty states do not allow future dangerousness evidence at all. *Id.*

67. TEX. HEALTH & SAFETY CODE § 841.081.

68. *Id.* at § 841.102(1).

69. *See Barefoot*, 463 U.S. at 913-14 (Marshall, J., dissenting).

any expert testimony regarding future dangerousness no matter how unreliable.[70] That is simply not accurate. *Barefoot* holds only that psychiatric testimony is not *per se* unconstitutional,[71] and that the Court was, "*at least as of now*," unconvinced that the jury could not distinguish the reliable from the unreliable itself.[72] However, ten years later this Court became "convinced" and ruled that a trial judge must ensure that all scientific testimony is reliable.[73] Numerous states, including Texas, have established a similar *Daubert* "gate-keeping" role for the trial court.[74]

As a result, the admission of unreliable, unscientifically verifiable so-called "expert" testimony is routinely found to be prejudicial and harmful error under the rules of evidence.[75] Such unreliable junk science predicting future

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70. *See Coble*, 330 S.W.3d at 270 (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983)).

71. *Barefoot*, 463 U.S. at 899 n.6.

72. *Id.* at 901 (emphasis added).

73. *Daubert*, 509 U.S. at 589.

74. *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

75. *See, e.g., Weisgram v. Marley Co.*, 169 F.3d 514, 518 (8th Cir. 1999) *aff'd*, 528 U.S. 440 (2000) (district court erred in admitting unreliable expert testimony; error was not harmless as it had "substantial influence on the jury's verdict"); *Sexton v. State*, 93 S.W.3d 96, 101 (Tex. Crim. App. 2002) (state failed to produce evidence that a "toolmark" examination technique used to match bullets to the weapon that fired them was reliable); *Hernandez v. State*, 55 S.W.3d 701, 705-06 (Tex. App.—Corpus Christi 2001), *aff'd*, 116 S.W.3d 26 (Tex. Crim. App. 2003) (trial court's judgment reversed because the State failed to establish that expert's testimony regarding urinalysis test satisfied *Kelly* factors).

dangerousness in capital murder cases – a situation affecting not only rules of evidence but also a defendant's right against cruel and unusual punishment under the Eighth Amendment – should be afforded at least the same, if not a heightened, level of scrutiny. The need for heightened reliability in capital sentencing should require that expert testimony on future dangerousness meet the minimum standards set forth in *Daubert*. The CCA's dismissal of Dr. Coons's erroneous and unreliable predictions of future dangerousness as harmless without regard to the standards established in *Daubert* violates the Constitution and requires review by this Court.

1. The *Daubert* standard.

In *Daubert*, this Court identified five non-exclusive factors to assist the trial court in determining whether an expert's testimony is reliable. Those factors are: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been submitted to peer review and publication; (3) the error rate of its application; (4) the existence of standards controlling the operation of the technique; and (5) the general level of acceptance of the technique within the relevant scientific community.[76] If the trial judge, when examining these factors, determines that the method or technique being used by the expert is unreliable, the expert testimony should not be admitted.[77]

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76. *Daubert*, 509 U.S at 593-94.

77. *Id.* at 589. Texas has adopted a similar factor test for expert testimony in criminal cases. *See Kelly*, 824 S.W.2d at 573. The CCA has also declared that "soft" sciences could be held to less rigorous standards. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex.

Indeed, in numerous contexts, from criminal to civil, courts routinely find admission of unreliable, unverifiable so-called expert testimony harmful and reverse and remand.[78] There is no basis to employ a lesser standard in capital murder cases. Indeed, the Constitution mandates a heightened standard.

2. Unreliable expert testimony does not survive constitutional scrutiny.

In finding the erroneous admission of Dr. Coons's testimony harmless, the CCA found that "the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness,"[79] but rejected Coble's argument that such unreliable testimony failed to meet the heightened reliability requirement of the Eighth Amendment because "the United States Supreme Court, in *Barefoot v. Estelle*, rejected this argument."[80] In reaching this conclusion, the Texas court applied a lesser standard of scrutiny in the context of a capital murder case – a case that necessarily implicates the Eighth Amendment – than applies in ordinary, everyday civil actions. This Court's precedent does not support such a result.

Crim. App. 1998). Nonetheless, in such cases, the court must still determine that (1) the field of expertise is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Id.*

78. *See supra* note 75.

79. *Id.* at 279.

80. *Id.* at 270.

Indeed, in *Barefoot*, this Court held only that psychiatric testimony predicting a criminal defendant's future dangerousness is not *per se* unconstitutional.[81] It did not hold that psychiatrists and other mental health professionals are free to make random, biased, unreliable, and unverifiable predictions of future dangerousness based on nothing more than gut instinct. In fact, the Court acknowledged the existence of studies indicating that predictions of future dangerousness were often inaccurate and unreliable.[82] This Court's subsequent holdings in *Daubert* and its progeny dictate that such testimony violates the rules of evidence and thus should not be admitted.[83]

Since this Court's decision in *Barefoot*, judges and scholars have recognized that juries give expert testimony much more weight than they do lay testimony.[84] Studies have shown that the title "Doctor" strongly sways

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81. *Barefoot*, 463 U.S. at 899 n.6.

82. *Id.* at 901 n.7.

83. *See supra* note 75.

84. *See Daubert*, 509 U.S. at 595 (quoting J. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound, It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it"). In fact, jurors may erroneously assume that such gatekeeping has occurred regarding the scientific findings presented to them, and, therefore, accord the associated expert testimony undeserved credibility. Mark D. Cunningham, et al., *Capital Jury Decision-Making, The Limitations of Predictions of Future Violence*, PSYCHOL., PUB. POLICY, & L. 230 (2009) (citations omitted).

jurors' opinions.[85] The CCA notes that lay persons "show an inordinate amount of deference to members of the medical profession."[86] This Court recognized the undue prejudice assigned to the erroneous testimony of a so-called "expert" in *Daubert*.[87] And cases since *Daubert* have consistently found the admission of such testimony as reversible error.[88]

At a minimum, Dr. Coons's testimony would be reversible error under the *Daubert* standard. But here, there is a more important, constitutional consideration that should tip the balance in favor of finding reversible error in the face of such unreliable so-called expert testimony, even if such testimony would be allowed in other circumstances. Here, Mr. Coble is being tried for capital murder, subject to the death penalty. He enjoys a constitutional right against cruel and unusual punishment under the Eighth Amendment.

Specifically, the Eighth Amendment provides a "need for reliability in the determination that death is the appropriate punishment in a specific case."[89] This Court has held repeatedly that the Eighth Amendment affords a criminal defendant a "correspondingly greater degree

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85. *Deadly Speculation*, *supra* note 44, at 12 (citing Stanley Milgram, *Obedience to Authority. An Experimental View* (1983).

86. *Sanne v. State*, 609 S.W.2d 762, 778 (Tex. Crim. App. 1980) (Phillips, J., dissenting).

87. 509 U.S. 579, 589 (1993).

88. *See supra* note 75.

89. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

of scrutiny of the capital sentencing determination."[90] Evidence that undermines "the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death" is not admissible.[91] Applying this reasoning, this Court has found reversible error in *Gardner v. Florida* when the trial court based a death sentence on a presentence investigation report that was not disclosed to the defendant,[92] and in *Caldwell v. Mississippi*, when the prosecution erroneously told the jury that that the appropriateness of the death sentence rested not with them but with the appellate court that would later review the case.[93] There is no basis to hold erroneous expert testimony in a capital murder trial to a lesser standard. On the contrary, for the reasons articulated in *Gardner* and *Caldwell*, it violates the Eighth Amendment to do so.

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90. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *see also Eddings v Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) ("[This] Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake").

91. *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

92. 430 U.S. 349 (1977).

93. 472 U.S 320 (1985).

CONCLUSION

The Texas court erred in finding the admission of Dr. Coons's erroneous and prejudicial testimony to be harmless without regard to the standards established in *Daubert* or the Texas equivalent. This error undermines the integrity of the testimony of mental health professionals and creates confusion as to the standards necessary to establish a probability of future dangerousness in Texas death penalty cases. Admission of such testimony without regard to the heightened scrutiny afforded capital murder defendants under the Eighth Amendment of the Constitution requires review by this Court. Accordingly, *Amici* urge this Court to grant Mr. Coble's petition for writ of certiorari.

Respectfully submitted,

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In The Supreme Court of The United States

BILLIE WAYNE COBLE,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR EVIDENCE AND CRIMINAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are scholars who teach and write about criminal law, criminal procedure, and evidence.[1] We file this brief to address the relationship between rules of admissibility for psychiatric testimony and Eighth Amendment standards for procedure in capital trials. The decision by the Texas Court of Criminal Appeals paid little attention to this relationship, but in so doing it ignored much of this Court's important capital punishment jurisprudence. *Amici* write to emphasize that the Eighth Amendment's emphasis on reliability and accuracy in capital trials has ramifications for the admissibility of expert testimony.

Our scholarly interest in this issue arises from teaching and writing in a variety of related fields, including criminal law, criminal procedure, evidence, and constitutional law. Erica Beecher-Monas is a Professor of Law at Wayne State University Law School where she teaches Evidence. David Bruck is a Clinical Professor of Law at Washington and Lee University School of Law where he directs the Virginia Capital Case Clearinghouse, which provides training and litigation assistance to court-appointed Virginia attorneys representing capitally-charged

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

clients before and at trial. Deborah Denno is the Arthur A. McGivney Professor of Law at Fordham University School of Law where she teaches Criminal Law and advanced criminal law seminars. George E. Dix holds the George R Killam, Jr. Chair of Criminal Law at the University of Texas School of Law where he teaches Criminal Law and Criminal Procedure. Paul C. Giannelli is the Albert J. Weatherhead III and Richard W. Weatherhead Professor of Law at the Case Western Reserve University School of Law where he teaches Evidence Alexander A Reinert is an Associate Professor of Law at the Benjamin N. Cardozo School of Law, where he teaches Criminal Law and Constitutional Law. Brian D. Shannon is the Charles Thornton Professor of Law at the Texas Tech University School of Law, where he teaches Criminal Law and Law and Psychiatry. Christopher Slobogin holds the Milton Underwood Chair in Law at Vanderbilt University Law School, where he is the Director of the Criminal Justice Program and teaches Criminal Law, Criminal Procedure, and Evidence.

SUMMARY OF ARGUMENT

In one conclusory and unelaborated sentence, the Texas Court of Criminal Appeals (CCA) below opined that the Constitution permits the State to introduce scientifically unreliable testimony from a psychiatric expert as to a defendant's future dangerousness at the sentencing phase of a capital trial. Pet. App. at 22a. Apparently reading this Court's opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983), as authorizing the admission of all expert

testimony without any threshold showing of minimal reliability, the CCA found that the Constitution imposes no limitations on the quality or validity of psychiatric expert testimony that can be presented to a jury deciding the critical question of whether a defendant lives or dies. Pet. App. at 22a. Because the CCA's decision is unsupported by *Barefoot*, in tension with developed jurisprudence regarding both capital punishment and expert witnesses, inconsistent with other constitutional principles, and could work serious mischief in capital proceedings, *amici curiae* respectfully urge this Court to grant the petition for writ of certiorari.

The import of the CCA's decision cannot be understated. Under the logic of the opinion, no constitutional principle prohibits the introduction of profoundly unreliable expert testimony at the sentencing phase. If otherwise permitted by local rules of evidence, for instance, a State could ask a jury to base its sentencing decision on the opinion of a psychic who testifies that his crystal ball revealed that the defendant will commit another crime in the future, or a palm reader who testifies that the defendant's life will end with violence to others. Just like the testimony at issue in this case, there would be no "objective source material" regarding these experts' methodologies, they would be "idiosyncratic," they would lack "empirical[] validat[ion]," and there would be no evidence that the methodologies used were accurate Pet. App. 38a-44a.

These hypotheticals seem outlandish because they are, particularly given modern rules of evidence regarding the admissibility of expert testimony as shaped by cases such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But the critical question raised by this case is whether the Constitution itself imposes any requirement that expert evidence used to condemn a defendant to death meet minimum standards of scientific reliability. And reality is not that far removed from the outlandish hypotheticals raised above. Dr. Coons might be a licensed psychiatrist, but the CCA concluded that his testimony and methodology did not meet basic gatekeeping thresholds of scientific reliability. Dr. Coons uses a "personal methodology" to evaluate future dangerousness – a methodology which is not supported by any published literature or studies. Pet. App. at 24a-26a. The CCA found that this methodology is "idiosyncratic" and that Dr Coons was not familiar with relevant empirical literature regarding evaluations of future dangerousness. Pet. App. at 38a-40a. Moreover, Dr. Coons had lost his interview notes from a 1990 interview with petitioner and performed no further assessment of petitioner even after he had been nonviolent for eighteen years while on death row. Pet. App. at 43a. Accordingly, the CCA found that the State failed to show that his testimony met minimum standards of scientific reliability. *Id.*

Despite finding that the trial court abused its discretion in admitting this evidence, the CCA affirmed petitioner's sentence of death after using a harmless error standard of review for non-

constitutional error. *Compare id.* at 45a n.73 *with Chapman v. California*, 386 U.S. 18, 22-24 (1967) (articulating harmless error standard for constitutional error). In other words, the CCA found that the Constitution poses no barrier to the introduction of unreliable scientific testimony at the penalty phase of a capital trial. If testimony like Dr. Coons' is viewed as constitutionally unobjectionable, however, it leaves open the door to other types of unreliable quackery. *See, e.g., General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring) (using as an example of "junk science" a phrenologist who would testify that future dangerousness was linked to the shape of a defendant's skull). Indeed, some experts have offered opinions regarding future dangerousness based in part on the defendant's race. *See Saldano v. Cockrell*, 267 F. Supp. 2d 635, 642 (E.D. Tex. 2003), *aff'd in part and dismissed on other grounds sub. nom. Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004) (holding that reliance on defendant's race as part of future dangerousness evaluation violated the Equal Protection Clause). These examples make clear that the absence of constitutional safeguards regarding the admissibility of expert testimony in capital trials is an invitation to the arbitrary imposition of the death penalty.

For several reasons, *amici* urge the Court to grant certiorari and clarify that the Constitution imposes limitations on the introduction of expert testimony that are at least as protective as those imposed by *Daubert* and its progeny. First, as we elaborate below, this Court has always emphasized

the need for accuracy and reliability in the practices and procedures of capital trials. Permitting expert testimony to be heard by the jury at the sentencing phase without meeting minimum standards of reliability undermines these interests without vindicating any important State interest. Second, permitting unreliable expert testimony contradicts evolving standards regarding the admissibility of expert testimony in other federal and state proceedings, as reflected in current rules of evidence. Finally, nothing in *Barefoot* suggests that the Constitution provides *carte blanche* for the introduction of scientifically unreliable expert testimony at the penalty phase. At most, *Barefoot* can be read to permit States to introduce *some* testimony regarding future dangerousness. Indeed, *Barefoot* anticipated that constitutional limitations on admissibility could change as modern rules of evidence evolve.

ARGUMENT

I. Fundamental Principles of Capital Punishment Jurisprudence Establish the Critical Importance of Reliability at the Punishment Phase

While permitted by the Constitution, this Court has consistently recognized that death is a sentence which differs from all other penalties in kind rather than degree. *See Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to

decency and restraint."); *Satterwhite v. Texas*, 486 U.S. 249, 262, (1988) (capital punishment is "qualitatively different from all other sanctions."); *Accord Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Stewart, J.). Accordingly, while the Eighth Amendment allows the death penalty as an appropriate response to especially egregious crimes, it also strictly regulates the procedures by which death sentences are imposed and reviewed The penalty phase in capital trials has been treated with particular care by this Court. *Monge v. California*, 524 U.S. 721, 731-32 (1998). The decisions in the penalty phase must "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Reliability is of paramount importance to avoiding the arbitrariness that would violate the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *accord Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Sentencing procedures for capital crimes must be created and enforced in a way that ensures "that the punishment will [not] be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 189 (opinion of Stewart, J.).

To ensure that death sentences are reliable and free from arbitrariness, this Court has required procedures calibrated to narrow the category of offenders subjected to capital punishment. First the

State must "provide a meaningful basis for distinguishing the few cases in which the [death] penalty is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (citations and internal quotation marks omitted), *see also Kennedy*, 554 U.S. at 420; *Kansas v. Marsh*, 548 U.S. 163, 174-80 (2006) (reviewing Kansas' capital sentencing system). Second, the State must permit defendants to present any available evidence which might convince a jury that the defendant, no matter how severe his offense or reprehensible his past, should not be put to death *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *cf. Penry v. Lynaugh*, 492 U.S 302, 322-26 (1989), *abrogated on other grounds, Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that instructions prevented jury from giving effect to defendant's mitigating evidence). At base, capital sentencing procedures must ensure that jurors consider every offender as an individual. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007) (jury must decide whether "death is an appropriate punishment for that individual in light of his personal history and characteristics."); *Accord Penry*, 492 U.S. 302 at 317; *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Lockett*, 438 U.S. at 605.

Each of these procedural requirements for the penalty phase is informed by the overlapping and substantial interest of both the defendant and the State in ensuring that capital trials are accurate and reliable. *See United States v. Scheffer*, 523 U.S. 303,

309 (1998) (State and Federal Governments "unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial"); *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) (both the State and the defendant have an "almost uniquely compelling" interest in the accuracy of criminal proceedings); *Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000) (E. Garza, J., concurring specially) ("[W]hat separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes.").

Related to the need that penalty phase procedures ensure accurate and reliable deliberations, these procedures must also be consistent with "evolving standards of decency." *See Kennedy*, 554 U.S at 419-20; *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion). Although this standard is well-accepted as a substantive limit on the power of the state to punish, *see, e.g., Roper v. Simmons*, 543 U.S. 551, 560-61 (2005), *Atkins*, 536 U.S. at 311-12, it has functioned as a procedural limitation on capital sentencing procedures as well. *See Gardner*, 430 U.S. at 357 (opinion of Stevens, J.); *see also Gregg*, 428 U.S. at 171-173 (opinion of Stewart, J.), *Woodson v. North Carolina*, 428 U.S. 280, 289-93 (1976) (plurality op.) (reviewing history of mandatory death penalty statutes to determine whether mandatory capital punishment was consistent with the Eighth Amendment).

This Court's treatment of the appropriate role for victim impact statements reflects how evolving

evidentiary standards can play a role in the constitutionality of particular sentences of death. *See Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled on other grounds*, *Payne v. Tennessee*, 501 U.S. 808 (1991). In *Booth*, this Court found that the introduction of victim impact statements in capital trials violated the Eighth Amendment. 482 U.S. 496 (1987). Although the Court in *Payne* later overruled a portion of *Booth*, at least one kind of victim impact statement found inadmissible in *Booth* continues to be barred after *Payne*: family members' opinions about the defendant, the crime, and the appropriate sentence. *Payne*, 501 U.S. at 830 n.2; *id.* at 835 n.1 (Souter, J., concurring). In explaining the shift from *Booth* to *Payne*, Justice O'Connor, joined by Justices White and Kennedy, suggested that in some cases, "strong societal consensus" will emerge that bar the introduction of particular kinds of evidence at capital trials. 501 U.S. at 808 (finding there was no such consensus with regard to victim impact statements).

Evolving standards of decency, accuracy, and reliability thus all play a role in determining the constitutional procedural standards that govern the penalty phase of a capital trial. In this framework, *amici* recognize that evidentiary rules that themselves improve accuracy or reliability are unobjectionable. *See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (States have power "to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability"). This is simply consistent with the well-established principle that a State's evidentiary rules should meet important State interests, particularly

when intruding on a "significant interest of the accused." *See Scheffer*, 523 U.S. at 309 (holding that defendant's right to present relevant evidence was not undermined by rule precluding admissibility of polygraph test). In contrast, when state evidentiary rules fail to serve the interests of fairness and reliability, those rules are suspect. For example, this Court in *Scheffer*, 523 U.S. at 316-17, contrasted the admissibility of polygraph tests with rules that had been struck down in *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Washington v. Texas*, 388 U.S. 14 (1967). What differed in those cases was a combination of an intrusion on the right of a defendant and a lack of legitimate interests for the State in maintaining the rule. Thus, in *Rock*, the Court held that a state rule barring the introduction of testimony that had been "hypnotically refreshed" violated a defendant's right to testify in her own defense. 483 U.S. at 56-57. And in *Washington*, the Court reversed on Sixth Amendment grounds a conviction where the State of Texas "could advance no legitimate interests in support" of the rule of evidence which prohibited codefendants or accomplices from testifying for one another. 388 U.S. at 22-23.

In short, rules that are unconstitutionally arbitrary are those that permit the introduction of unreliable evidence or exclude important evidence offered by the defense without serving any legitimate interest. *See Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). Local rules of evidence which intrude on a constitutional right also are prohibited. *Burgett v. Texas*, 389 U.S 109, 114-15

(1967) (holding that evidentiary presumption was unconstitutional because it intruded on right to counsel). As discussed below, permitting the introduction of unreliable expert testimony at the penalty phase of a capital trial serves no legitimate interests and undermines constitutionally significant interests in reliability and accuracy.

II. The Admission of Unreliable Expert Testimony Regarding Future Dangerousness Violates the Eighth Amendment

The admission of unreliable expert testimony threatens essential aspects of a constitutional death penalty regime. It undermines accuracy and reliability because it contributes to arbitrary verdicts of death. It is inconsistent with evolving standards of decency because, since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), there has been an increasing trend towards subjecting expert testimony to threshold reliability determinations prior to its admission before a jury. See David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 355-56 (2004).

The need for reliability and accuracy in expert testimony is profound when the subject of the testimony is future dangerousness in a capital case. A jury's assessment of future dangerousness can be affected by many arbitrary factors, highlighting the need to pay special attention to the evidence that is put before the jury regarding this aggravating factor. *See Deck v. Missouri*, 544 U.S. 622, 632-33 (2005)

(holding that shackling defendant during penalty phase violates due process because of "acute need" for reliability and possibility that an offender who appears shackled at the penalty phase "almost inevitably" would be taken by the jury to present a future danger); *Riggins v. Nevada*, 504 U.S. 127, 143-44 (1992) (Kennedy, J., concurring in the judgment) (finding that forcible administration of antipsychotic medication to capital defendant at penalty phase violated rights to due process in part because of effect of defendant's appearance on jury's assessment of future dangerousness). The Court's concern about the accuracy of juries' assessments of future dangerousness has even influenced its decisions about the substantive protections of the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (expressing concern about subjecting persons with mental retardation to the death penalty because, retardation could be a mitigating factor but also "enhance[s] the likelihood that the aggravating factor of future dangerousness will be found by the jury").

The critical role of expert witnesses in establishing future dangerousness is also well understood by this Court. Psychiatric testimony on future dangerousness is compelling because of the qualifications of psychiatrists, the "powerful content" of their testimony, and the "significant weight" that the prosecution may place on the witness's testimony. *See Satterwhite*, 486 U.S. at 259-60 (holding that testimony may not be introduced from expert who interviewed defendant in violation of Sixth Amendment right to counsel). Moreover,

indigent defendants are entitled to the assistance of the State in securing expert testimony when the defendant's mental state is "seriously in question" because psychiatric testimony plays a "pivotal role" in criminal proceedings *See Ake*, 470 U.S. at 79-80. The role of a psychiatrist is particularly important because of the difficulty lay jurors have in rationally and accurately evaluating a defendant's mental condition. *Id.* at 80-81 (providing psychatiric experts to defendants will "enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81. It defies logic and intuition for the Constitution to require, for the sake of accuracy, that a defendant have reasonable access to expert psychiatric assistance while simultaneously permitting the State to introduce unreliable testimony by a psychiatrist as in this case.

Highlighting the need to carefully police the quality of evidence that is presented to a jury regarding future dangerousness is the likelihood that a jurors' assessment of future danger will be biased towards the State's evidence. Jurors, asked to determine whether an individual who committed at least one murder will act violently again, are understandably likely to defer to an "expert" determination which will eliminate the consequences of an incorrect determination, even if its reliability is questioned by another "expert." *See* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L. J. 275, 312-15 (2006) (summarizing data); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the*

Impulse to Condemn to Death, 49 STAN. L. REV. 1447, 1469-70 & n.113 (1997).

It does not help that expert opinions regarding future danger are notoriously inaccurate. Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L. REV. 1845, 1845-46 (2003); Slobogin, *supra*, 56 Emory L. J. at 290-93 (discussing difficulty in evaluating validity of expert testimony on future dangerousness). In part this is because psychiatrists and psychologists have less information than they realize and because they are just as likely as lay people to come to conclusions based on stereotype and bias. Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 362-363 (2003).

Thus, although States are permitted to take future danger into account in dispensing the death penalty, *Jurek v. Texas*, 428 U.S. 262, 274-276 (1976), the complexity of such determinations necessitates ample procedural protections be provided to a defendant.[2] At a minimum, this Court's consistent focus on reliability at the penalty stage leaves little doubt that the admission of unreliable expert testimony regarding future dangerousness at the penalty phase undermines

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[2] In *Jurek*, the Supreme Court had no occasion to decide what procedures are necessary to ensure that juries have the proper information presented to resolve the future dangerousness inquiry, because it found that Texas supplied all of the necessary procedures at the time. 428 U.S. at 276

both the defendant's and the State's interest in avoiding arbitrariness in capital punishment.

The need for reliability and the importance of expert testimony regarding future dangerousness on their own would be enough to conclude that the Eighth Amendment prohibits the introduction of unreliable expert testimony regarding future dangerousness at the penalty phase. In addition, however, current evidentiary standards extant in the federal system as well as the several States make such a conclusion inescapable.

This Court has traditionally looked to the actions of state and Federal legislatures as the best indication of evolving standards of decency. *See Roper*, 543 U.S. at 564-66, *Atkins*, 563 U.S. at 314-15. Since the announcement of *Barefoot*, there has been a significant development in the area of expert testimony and its admissibility: *Daubert* and its progeny. Simply put, after *Daubert*, it is no longer the case that in federal court issues of reliability are placed in the hands of the jury. Rather, *Daubert* squarely places reliability determinations as a threshold matter in the hands of the trial court. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (referring to "gatekeeping obligation" created by *Daubert*); *Daubert*, 509 U.S. at 597 (referring to "gatekeeping role" of judge).[3]

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[3] Even though the Federal Rules of Evidence do not apply in State sentencing proceedings, as one judge on the Fifth Circuit has observed, reliability is essential both to the Federal Rules and capital jurisprudence, something that "cannot be

Daubert interpreted Federal Rule of Evidence 702, which does not on its face govern the penalty phase of state cases such as this one.[4] *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (states may adopt their own rules of evidence "so long as they do not violate the Federal Constitution"). But the logic of *Daubert* is based on what is fundamental and essential to preventing the arbitrary imposition of capital punishment: reliability. As *Daubert* reasoned, an expert's opinion must be reliable, because unlike lay witnesses, experts are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592. As one moves farther away from the requirement of first-hand knowledge, a sufficient indicia of reliability at common law, expert testimony must find its reliability elsewhere. *Id.* Thus, expert testimony must be based on "scientifically valid" methodologies and reasoning. *Id.* at 593-94 (describing five factors that guide reliability determinations). Where legal disputes are of "great consequence," as in capital cases, the need for gatekeeping is even more pressing. *Id.* at 597; *see also Kumho Tire Co.*, 526 U.S. at 152 (1999) (*Daubert*'s objective is to secure reliable and relevant testimony).

Daubert's admissibility requirements regarding expert testimony have been adopted by

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mere coincidence." *Flores*, 210 F.3d at 464 (E. Garza, J., concurring specially).

[4] Texas is one of the many states that has applied *Daubert* to state rules of evidence. *See* Pet. App. at 27a-30a.

numerous state courts since the announcement of *Barefoot*. *See* Bernstein & Jackson, *supra*, 44 JURIMETRICS J. at 355-56 (observing that by mid-2003, roughly twenty-seven states had adopted a test consistent with *Daubert*) Taken together, at least thirty-three states have adopted *Daubert* or some other reliability-based admissibility test for expert scientific testimony. *See* Paul C. Giannelli and E J. Imwinkelried, SCIENTIFIC EVIDENCE (4th ed., 2007) §§ 1 14-1.15 (listing twenty eight states that have adopted *Daubert*, and five states that have adopted a variant of a reliability-based test). Along with the reliability-based reasons discussed above for preserving some gatekeeping role for judges prior to the admission of expert testimony, this trend is sufficient to show an evolving standard in favor of such evidentiary standards. In *Roper*, for instance this Court found sufficient evidence of a consensus against execution of juvenile offenders based on the absolute number of states that prohibited such executions – 30 including the 12 that had abandoned the death penalty altogether – and the "trend" in prohibiting such execution – the five states that over fifteen years had moved from permitting such executions to prohibiting them. *See Roper*, 543 U.S. at 565-67; *see also Atkins*, 536 U.S. at 313-15.

Moreover, there is no articulable State interest in introducing unreliable expert testimony. *See Scheffer*, 523 U.S. at 316-17. Indeed, the fact that so many states already prohibit such unreliable expert testimony suggests both the lack of legitimate interest and the lack of burden imposed by making clear the constitutional standards for admissibility

at the penalty phase. *Cf. Ake*, 470 U.S. at 79-80 (holding that indigent defendants are entitled to assistance from State in securing expert psychiatric testimony in part because more than 40 states already provided such assistance). If unreliable expert testimony is considered to be of no value to civil juries in damages cases, it should not be permitted when a jury is considering the possibility of a death sentence in a capital case.

III. *Barefoot* Does Not Compel The Result Reached By The Texas Court of Criminal Appeals

Contrary to the CCA's holding, nothing in *Barefoot* undermines the constitutional requirement that expert testimony on future dangerousness be reliable. A close examination of the decision lays bare the failings of the lower court's analysis. The central issue presented in *Barefoot* was whether psychiatrists can *ever* testify competently about future dangerousness, not whether a particular expert's testimony was constitutionally unreliable. 463 U.S. at 884-85 (summarizing petitioner's arguments on appeal as concerning whether the predictions of psychiatrists "are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments"); *id.* at 896 ("First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community."). The

Court clearly rejected this argument, making the logical point that so long as future dangerousness, properly defined, is an acceptable aggravator at the penalty stage, lay as well as expert testimony may be admissible on the issue.

As to the question that is relevant in the instant case, the Court's decision in *Barefoot* offers scant guidance. Granted, the Court adopted language pointing to the ability of fact-finders to screen reliable from unreliable evidence of future dangerousness, *id.* at 898-99, but such language was specifically cabined by the "rules of evidence generally extant at the federal and state levels." *Id.* As discussed above, the extant rules of evidence have changed substantially since the announcement of *Barefoot*, an eventuality that would seem to be anticipated by this Court

Overall, the *Barefoot* Court was much more focused on addressing the thrust of the petitioner's argument that as a categorical matter psychiatric testimony regarding future dangerousness is always unreliable. *Id.* at 899 ("We are no more convinced now that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony."); *id.* at 900 ("Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials."); *id.* at 901 ("We are unaware of and have been cited to no case, federal or state, that has adopted the categorical views of the Association.").

Yet even so, *Barefoot* left the door open to such a challenge, stating that "[w]e are unconvinced, however, *at least as of now*, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case." *Id.* at 900 (emphasis supplied).

These conflicting aspects of *Barefoot*, as well as the developments in admissibility of exerpt testimony occasioned by *Daubert*, have contributed to significant confusion, an independent reason for granting certiorari in the instant case. Numerous commentators have found tension between the modern rules of evidence exemplified by *Daubert* and its progeny and the optimistic assessment of juror capabilities reflected by *Barefoot*. See, e.g., Erica Beecher-Monas & Edgar Garcia-Rill, *The Law & The Brain: Judging Scientific Evidence of Intent*, 1 J. APP. PRAC. & PROCESS 243, 222 (1999) ("In light of *Daubert*'s emphasis on acceptable error rates . . . *Barefoot*'s decision is highly questionable."); Michael H. Gottesman, *From* Barefoot *to* Daubert *to* Joiner: *Triple Play or Double Error*, 40 ARIZ. L. REV. 753, 755 (1998) ("*Daubert* cannot be squared with *Barefoot*."); Randy Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCHOL. REVW. 43, 64 & n. 65 (1994); Paul C. Giannelli, "Junk Science": The Criminal Cases, 84 J.Crim. L. and Criminology 105, 112 (1993). More troubling,

the relationship between *Barefoot* and *Daubert* and its progeny has been a source of great confusion in lower courts. *See Flores*,,210 F.3d at 458-70 (E. M. Garza, J. specially concurring) (noting that the Supreme Court's decision in *Daubert* may have undermined *Barefoot*); *United States v. Sampson*, 335 F.Supp.2d 166, 220-21 (D. Mass. 2004) (stating that there is a "serious question" as to whether the Supreme Court would, in a post-*Daubert* world, continue to hold that a jury may impose the death penalty based on its prediction of a defendant's future dangerousness). Indeed, Arizona's Supreme Court has concluded that it is "impossible" to reconcile *Daubert* with *Barefoot*. *See Logerquist v. McVey*, 1 P.3d 113, 127 (Ariz. 2000).

Other courts have recognized the criticism of *Barefoot* in light of *Daubert*, but have considered themselves to be without power to undermine *Barefoot*, either because of the nature of habeas review or because of the need to await this Court's action in overruling or limiting *Barefoot*. *See Cook v. Cockrell*, 2002 WL 495455 (5th Cir. 2002) (unpub. op.) (declining to "undercut *Barefoot* because AEDPA permits habeas relief only for violations of "clearly established" federal law); *Tigner v. Cockrell*, 264 F.3d 521, 526-27 (5th Cir. 2001) ("We decline Tigner's invitation to undercut *Barefoot*, because to do so on collateral review would constitute a new rule in violation of *Teague*'s non-retroactivity principle."); *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1177, 1183 (D. Colo. 2006) (declining to revisit *Barefoot* because the Supreme Court must reinterpret its own binding precedent).

Finally, some courts have simply chosen to leave *Barefoot* undisturbed, despite the advent of *Daubert*. *See Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002) (rejecting contention that *Daubert* and its progeny altered the admissibility of future dangerousness testimony); *Little v. Johnson*, 162 F.3d 855, 862-63 (5th Cir. 1998) (rejecting, on the strength of *Barefoot*, a challenge to similar testimony). Indeed, some lower courts have interpreted *Barefoot* to mean that future dangerousness testimony is always admissible, regardless of how unreliable it is. *Billips v. Commonwealth*, 630 S E.2d 340, 352 & n.3 (Va. Ct. App. 2006), *rev'd on other grounds* 652 S.E.2d 99 (Va. 2007) (holding that *Barefoot* survived *Daubert* and that juries have the ability to distinguish between reliable and unreliable evidence).[5]

This confusion is unfortunate, given the fact that *Barefoot* does not squarely hold that reliability of expert testimony is constitutionally irrelevant. To the contrary, as explained above, the *Barefoot* Court expressly rejected a categorical bar to the admission of such testimony, but implicitly suggested that developments in evidentiary standards might alter the constitutional background. In light of the constitutional commitment to reliability and accuracy in capital sentencing proceedings and

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[5] In reversing the Court of Appeals, the Supreme Court of Virginia did not address the constitutional question, instead holding that the scientific evidence in question was unreliable under state law and that the error in its admission was not harmless. 652 S.E 2d at 101-02.

subsequent developments in evidence law, this Court should take this opportunity to clarify the meaning of *Barefoot*. This Court can readily and narrowly hold that the constitution requires some indicia of reliability prior to the admission of expert testimony on future dangerousness without running afoul of *Barefoot* in at least two ways. First, and most narrowly, *Barefoot* simply did not address the issue of whether the Constitution permits the introduction *of unreliable expert testimony on future* dangerousness at the penalty phase. Second, even to the extent that it might have done so, the context of evidentiary standards has changed No longer do the vast majority of courts leave it to jurors to assess reliability of expert testimony. The trend has moved sharply in the direction of leaving threshold reliability determinations to the court, precisely because of the recognition that jurors are ill-equipped to make such determinations. Thus, "evolving standards of decency" call for a different answer to the question that was at most implicitly answered in *Barefoot*: now nearly thirty years later, legislatures generally recognize the need to have a gate-keeper make threshold determinations of reliability prior to the introduction of important and highly complex expert testimony regarding the life or death of the defendant.

Recognizing this principle would be consistent with the many ways in which this Court has ensured the integrity of a capital trial. Thus, it is unconstitutional to base the death penalty on an aggravating factor for which insufficient evidence has been presented at the sentencing phase. *See*

Sochor v. Florida, 504 U.S. 527, 539-40 (1992) (finding constitutional error when trial judge weighed "coldness" factor when there was insufficient evidence to support a finding that murder was committed in a cold, calculated, and premeditated manner). *Amici* maintain that the State has as little interest in imposing a death sentence based on unreliable expert testimony as it has imposing death based on no evidence at all.

Finally, this case presents an excellent vehicle for answering this question. Unlike some of the cases discussed above, this case is on direct review, permitting this Court to announce and apply a constitutional rule without the complications of habeas review. Second, because the CCA unambiguously found that the State had failed to demonstrate the reliability of the psychiatric testimony admitted by the trial court, this Court can focus directly on the relevant constitutional question.

CONCLUSION

For the reasons set forth above and in the petition, *amici curiae* respectfully urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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